IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1650

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, SILVERGATE DISTRICT LODGE 50, An Association,

Petitioner,

v.

DAVID ANDERSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TOPICAL INDEX

TOPICAL INDEX (Continued)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (Continued)

TABLE OF AUTHORITIES (Continued)

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Petitioners, General Dynamics Convair Aerospace Division and Silvergate District Lodge 50, International Association of Machinists and Aerospace Workers, AFL-CIO, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in these proceedings on September 7, 1978.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is officially reported at 589 F.2d 397. The opinion rendered by the District Court for the Southern District of California is reported at 430 F.Supp. 418. Both opinions are set forth in the appendix.

JURISDICTION

The Court of Appeals for the Ninth Circuit entered its opinion and judgment on September 7, 1978. A timely petition for rehearing en banc was denied on January 16, 1979, and this petition for certiorari was filed within ninety days of that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the duty of reasonable accommodation mandated by § 701(j) of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000e(j)), violates the Establishment Clause of the First Amendment.

2. Whether the duty of reasonable accommodation in the "dues area" requires a union to violate its collective bargaining agreement in order to accord preferential treatment to religious objectors of union security clauses.

STATUTORY PROVISIONS INVOLVED

The union security provisions of the National Labor Relations Act, as amended, § 8(a)(3), 29 U.S.C. § 158(a)(3), provide in relevant part:

> [N]othing in this subchapter . . . shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment. . . .

The second provision of § 158(a)(3) allowing for "financial core" membership provides in relevant part:

> [N]o employer shall justify any discrimination against an employee for nonmembership in a labor organization . . . if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

The Civil Rights Act of 1964, 42 U.S.C. § 2000 et seq., as amended, provides in relevant part as follows:

> It shall be an unlawful employment practice for an employer –
> (1) to fail or refuse to hire or to discharge any individual . . . with respect to his compensation, terms, condition, or privileges of employment, because of such individual's race, color, religion, sex or national origin; . . .
> 42 U.S.C. § 2000e-2(a)(1)

> It shall be an unlawful employment practice for a labor organization . . . (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section. 42 U.S.C. § 2000e-2(c)(3).
>
> For purposes of this subchapter . . . [T]he term "religion" includes all aspects of religious observances and practices, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business. 42 U.S.C. § 2000e(j).

Rule 52(a), Federal Rules of Civil Procedure, provide in relevant part:

> Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

The National Labor Relations Act, as amended, 29 U.S.C. § 159(a), provides in relevant part:

> [A]ny individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect. . . .

STATEMENT OF CASE

On October 3, 1975, David Anderson (hereinafter referred to as "Respondent") instituted this action in the District Court for the Southern District of California against his employer, General Dynamics Convair Aerospace Division (hereinafter referred to as "General Dynamics") and Silvergate District Lodge 50, International Association of Machinists and Aerospace Workers, AFL-CIO (hereinafter referred to as the "Union".

The jurisdiction of the District Court was invoked pursuant to Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e et seq.

This case involves the termination of respondent by General Dynamics pursuant to the request of the Union, for his failure to join or contribute to the Union. Respondent claimed a violation of Title VII of the Civil Rights Act of 1964, as amended, based upon Petitioners' failure to accommodate his religious beliefs.

Respondent was employed on a regular basis by General Dynamics from October 11, 1956, until June 16, 1972. However, he was terminated and reinstated twice during that period for reasons discussed below. Since 1959, respondent has been a member of the Seventh Day Adventist Church. It is a tenet and basic principle of this Church that its members should not belong to any labor union. Although the decision not to join or support a labor organization is left to the individual church member, respondent has, during the pendency of the instant case, adhered to the conviction that joining or contributing to a labor union violates the tenet of the Church.

Between 1959 and April 3, 1972, the collective bargaining agreement between the petitioners did not require that employees of General Dynamics become members of the Union. As a result, respondent was able to work for General Dynamics during this period without belonging to the Union.

On two occasions during that period (in 1962 and 1968), respondent was terminated by General Dynamics for refusing to work on the Sabbath of the Seventh Day Adventist Church. On both of those occasions, respondent utilized the Union's grievance procedure to secure reinstatement even though he was not a Union member, had never contributed financially to the Union and could have sought reinstatement on his own as sanctioned by the National Labor Relations Act, as amended, 29 U.S.C. § 159(a). Respondent sought Union assistance and the Union processed his grievances in accordance with its statutory duty to represent all employees in the bargaining unit regardless of membership in the Union.

During respondent's employment with General Dynamics, he accepted wage increases and other benefits that the Union had bargained for, as well as made use of the upgrade review process in the collective bargaining agreement. In addition, on one occasion, a Union representative prevented respondent from being unfavorably transferred and, on another occasion, assisted respondent with a contractual disciplinary warning.

On April 3, 1972, the petitioners entered into their first union security agreement which required that all employees become members of the Union. Article 9, Paragraph B of the Agreement provides as follows:

> Any employee on the company's active payroll who is in the bargaining unit and is not a member of the Union on 3 April, 1972, shall, as a condition of continued employment in the bargaining unit, join the Union within ten (10) days after the thirtieth (30th) day following the effective date of this agreement, and shall maintain his membership as provided in Paragraph A above.

Through conversations with a Union committeeman, respondent was informed and understood that he would not have to participate in the Union's functions, but only pay his dues. When respondent refused to join or financially contribute to the Union, the Union committeeman suggested a charity substitution to which respondent would not consent.

Respondent ultimately claimed that he had religious objections to joining or contributing to the Union, and did not join the Union within the time prescribed by the union security clause.

On May 25, 1972, the Union notified respondent as to his delinquency relative to the requirements of the union security provisions. Thereafter, on June 12, 1972, respondent informed General Dynamics, who in turn informed the Union, that his religious beliefs prohibited him from joining the Union. Two days later, the Union sent a letter to General Dynamics requesting that respondent be discharged for failure to join the Union. On or about June 14, 1972, upon receiving notice that he would be terminated unless he joined the Union, respondent again informed General Dynamics that his religious convictions would not allow him to join the Union.

On June 16, 1972, respondent was terminated by General Dynamics.

On September 27, 1972, respondent filed a Charge of Discrimination against both petitioners with the Equal Employment Opportunity Commission (EEOC). On November 6, 1972, the EEOC deferred the complaint to the California Fair Employment Practice Commission. The matter was referred back to the EEOC on December 6, 1972, and on April 12, 1974, a decision was entered finding reasonable cause to believe that respondent was entitled to relief.

On July 15, 1975, the EEOC notified respondent that conciliation efforts had failed and a "Notice of Right to Sue Within 90 Days" was received by respondent on October 14, 1975.

On October 3, 1975, respondent sued General Dynamics and the Union in the United States District Court for the Southern District of California alleging a violation of Title VII of the Civil Rights Act of 1964, as amended, for failure to accommodate his religious beliefs. [42 U.S.C. § 2000e(j)]

The District Court found in favor of petitioners General Dynamics and the Union concluding that anything less than payment of the equivalent of dues to the Union for charitable purposes would result in undue hardship to the Union. The Court recognized that non-payment of dues or their equivalent deprives the Union of the money it needs to negotiate for the benefit of employees and money to which it is entitled for services rendered. The Court also noted that the payment of money to a charity does not eliminate "free riders."

Based on the facts presented, the Court concluded that the respondent's refusal to give the equivalent of dues to the Union to be paid to a charity of respondent's choice, was based on his general distrust of unions, rather than on religious beliefs. Recognizing the overriding interest of the Union in carrying out its bargaining function with sufficient funds, the Court held that accommodation under the circumstances of this case was impossible because of respondent's unyielding position. The Court declined to reach the Union's claim that the reasonable accommodation provision of Title VII violates the Establishment Clause of the First Amendment to the United States Constitution.

Respondent appealed this decision and the Court of Appeals for the Ninth Circuit reversed. Despite the evidence produced by the Union, the Court concluded that the hardships to the Union resulting from the loss of respondent's dues and the problems in industry created by "free riders" were only hypothetical. Therefore, the Court ruled that General Dynamics and the Union failed in their burden to establish undue harship. The Court declined to address the question of whether the reasonable accommodation provision of Title VII violates the Establishment Clause of the First Amendment.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW CONFLICTS IN PRINCIPLE WITH THIS COURT'S DECISION IN *TRANS WORLD AIRLINES, INC. v. HARDISON*, 432 U.S. 63 (1977)

In *Hardison v. Trans World Airlines, Inc.*, 527 F.2d 33 (8th Cir. 1975), the Court of Appeals for the Eighth Circuit held that an employee, who was unable to work on Saturday without violating the tenets of his religion, should have been accommodated by his employer even though this would have violated the seniority provisions of the collective bargaining agreement. In reversing the Court of Appeals, this Court held that the duty of accommodation under Title VII of the Civil Rights Act did not require the employer to violate an otherwise valid collective bargaining agreement. This Court held:

> [W]e do not believe that the duty to accommodate requires TWA to take steps inconsistent with the otherwise valid agreement. Collective bargaining, aimed at effecting workable and enforceable agreements between management and labor, lies at the core of our national labor policy, and seniority provisions are universally included in these contracts. Without a clear and express indication from Congress, we cannot agree with Hardison and the EEOC that an agreed-upon seniority system must give way when necessary to accommodate religious observances. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. at 79.

There is no reason to distinguish between the seniority provisions of the collective bargaining agreement in *Trans World Airlines* and the Union security provision of the bargaining agreement in the instant case. As with the seniority provision of the collective bargaining agreement in *Trans World Airlines*, the union security provision of the collective bargaining agreement in the instant case bears the imprimatur of congressional approval. The National Labor Relations Act, as amended, 29 U.S.C. § 158(a)(3), provides the authorization for companies and unions to negotiate union security provisions in a collective bargaining agreement. Just as with seniority provisions, Congress recognized that union security provisions play an integral part in stable labor relations and industrial peace. See *Yott v. North American Rockwell Corp.*, 501 F.2d 398 (9th Cir. 1974); *Wondzell v. Alaska Wood Products, Inc.*, 583 P.2d 860 (Alaska Supreme Ct. 1978).

This Court recognized in *Trans World Airlines* that requiring TWA to violate its seniority provisions to give Hardison Saturdays off could only be done at the expense of other employees who may have had strong, but perhaps nonreligious reasons for not working weekends. This Court held that "Title VII does not require an employer to go that far." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. at 81. In the instant case, the Court of Appeals for the Ninth Circuit would have those employees who do not object to union security clauses for religious reasons make up the loss of fees from those employees who refuse to contribute. This would occur because it would be impossible for the Union, whose only source of income is initiation fees and dues, to continue to represent all employees without charging more from those

who do contribute. This Court does not require a union to go this far.

In *Trans World Airlines*, this Court held that TWA had satisfied its burden of reasonable accommodation by meeting with Hardison several times to find a solution, by accommodating his special religious holidays and by authorizing the union steward to search for someone to swap shifts with Hardison.

In the instant case, the Union representative, Matson, discussed possible solutions with respondent several times. Matson explained that respondent was only obligated to pay dues and was not required to participate in Union activities at any time. Matson informed respondent that several members of respondent's own Church had found this position acceptable but respondent refused this proposed accommodation. Matson also discussed the possibility of a charity substitution to which respondent adamantly refused. It was because of respondent's unyielding position that the District Court held that no accommodation was possible. In addition, General Dynamics and the Union had accommodated respondent's special religious holidays as well as his Sabbath. The Union did not offer respondent a total exemption from paying dues or its equivalent because to do so would violate the union security provision of its collective bargaining agreement. Like TWA, the Union has satisfied its duty of reasonable accommodation.

One of the bases for this Court's decision in *Trans World Airlines* was the absence of any discriminatory intent by TWA against Hardison. This Court stated, "Thus, absent a discriminatory purpose, the operation of a seniority system

cannot be an unlawful employment practice even if the system has some discriminatory consequences." *Id.* at 82.

As in *Trans World Airlines*, there is no evidence whatsoever in the instant case of any intent by the Union to discriminate against respondent. In fact, the evidence shows that the Union aided respondent on several occasions. In 1962 and 1968, the Union got respondent reinstated after he lost his job for refusing to work on the Sabbath. The Union also acted on respondent's behalf when he was faced with an unfavorable transfer and again when he was faced with a contractual disciplinary warning. In addition, respondent, like all employees, benefited from the Union's efforts to obtain better wages, hours and working conditions.

In *Trans World Airlines* this Court held that to require TWA to permit Hardison to work a four day week causing other shop functions to suffer, or to fill Hardison's Saturday shift with personnel charging premium overtime pay or to arrange a swap of shifts in violation of the seniority provisions would constitute undue hardship on TWA within the meaning of the statute. This Court stated, "[T]o require TWA to bear more than a de minimis cost in order to give Hardison Saturdays off is an undue hardship." *Id.* at 84.

In the instant case, the Court of Appeals ignored the hardship to the Union caused by the loss of dues. Because dues are the Union's sole source of income, their loss threatens the Union's very existence. Loss of dues was particularly critical in this case because the Union was operating at a deficit during all relevant times. In addition, it is not just one individual's dues which will be lost to the Union, but many. Indeed, the majority of this Court in *Trans World Airlines*

recognized that a court has to "take account of the likelihood that a company as large as TWA may have many employees whose religious observances, like Hardison's, prohibit them from working Saturdays or Sundays." *Id.* at 84, n. 15.

The Court of Appeals also ignored the other hardships to the Union caused by "free riders" including the resentment of other employees, loss of solidarity and disruption of production. The Court of Appeals attempts to brush aside the very problems considered so serious by Congress that union security clause legislation was passed to prevent them.

Finally, the Court of Appeals ignored the fact that the Union's grant of preferential treatment to a religious objector would be a direct violation of its union security agreement. The Court of Appeals has required the Union to suffer undue hardship in order to accommodate respondent in violation of this Court's holding in *Trans World Airlines.*

II.

THE INTERPRETATION OF TITLE VII IN THE "DUES AREA" BY THE COURT OF APPEALS RESULTS IN IMPORTANT AND RECURRENT NATIONWIDE PROBLEMS IN THE ADMINISTRATION OF VALID UNION SECURITY CLAUSES IN COLLECTIVE BARGAINING AGREEMENTS

The vast majority of cases which have arisen under § 701(j) of Title VII are Sabbatarian cases. See *Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63 (1977); *Rohr v. Western Electric Company, Inc.,* 567 F.2d 829 (8th Cir. 1977); *Cummins v. Parker Seal Co.,* 516 F.2d 544 (6th Cir. 1975), affirmed by an

equally divided Court, 429 U.S. 65 (1976), vacated for further consideration, 433 U.S. 903 (1977). These cases involve situations in which an employee refuses to work on the Sabbath of his religion. Accommodating a Sabbatarian involves a rearrangement or readjustment of work schedules which can frequently be done with little or no impact on the union or on the employer's business. If employee grumbling or dissatisfaction results, it is generally limited to those employees who are directly affected by having to work for a religious objector on the Sabbath.

Accommodation in the fee area is a much more difficult task. Unlike Sabbatarian cases, a fee case strikes at the very heart of the union's existence because it presents a problem of a cutoff of the union's funds. The union's only source of income is initiation fees and dues. Any loss of these resources threatens the union's existence.

In addition, a fee case presents a conflict with the Congressional policy of having all employees pay their fair share of the costs of collective bargaining and administration of the union. Congress has sanctioned union security agreements as an integral part of our labor relations policy. The National Labor Relations Act, as amended, § 8(a)(3), 29 U.S.C. § 158(a)(3), provides in relevant part:

> [N]othing in this subchapter . . . shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment. . . .

The Second proviso to § 158(a)(3) reduces the union security clause to a simple obligation to pay a share of the cost of representation. It forbids an employer from discrimination against an employee for nonmembership in a labor organization

> "if he has reasonable grounds for believing that membership was denied or terminated for reasons *other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.*" [Emphasis supplied]

Accordingly, the obligation upon respondent is only a limited financial obligation. He cannot be compelled to join the Union but only to pay his dues. Moreover, he does not have to participate in any of its activities. See *N.L.R.B. v. General Motors Corp.*, 373 U.S. 734 (1963); *Radio Officers' Union v. N.L.R.B.*, 347 U.S. 17 (1954).

After studying the Congressional history of union shop agreements, the Court of Appeals in *Yott v. North American Rockwell Corp.*, 501 F.2d 398 (9th Cir. 1974), established that Congress did *not* intend Title VII to modify the National Labor Relations Act's authorization of union security clauses. The court also traced the Congressional history of attempts to enact exemptions to the union security provisions of the National Labor Relations Act. In 1974, Congress did provide an express exception to specifically accommodate religious beliefs in the health care field. See Section 19 of the National Labor Relations Act, as amended, 29 U.S.C. § 169. The fact that Congress limited the exception to the health care field clearly evidences a legislative intent to uphold union security agreements without exemptions in all other areas.

Congress' realization that all employees must be required to pay for the services of the union is highlighted in this case. Respondent has benefited over the years from the Union's efforts in getting better wages, hours and working conditions. Even more importantly, respondent benefited directly from Union efforts on his behalf in 1962 and 1968 when he was fired for refusal to work on his Sabbath. Even though respondent could have sought reinstatement on his own under 29 U.S.C. § 159(a), he requested the Union's help. The fund that respondent refuses to contribute to is the very fund which financed the Union's representation of him in 1962 and 1968 to get his job back.

The decision of the Court of Appeals places unions in an intolerable situation. Thousands of employees are covered by valid union security clauses of collective bargaining agreements under the National Labor Relations Act, as amended. To require a union to accommodate the religious idiosyncracies of its thousands of members would pose insurmountable problems in maintaining adequate financial resources for its very existence.

Every time an individual refuses to pay union dues because of an alleged religious reason, the reasonable accommodation provision necessarily requires the union to spend time and money to determine whether the person's belief is part of an authentic religious creed, is sincerely held, and is the actual basis for the refusal to pay dues. With the number of religious sects increasing constantly, especially in California, and the plethora of other social, economic and philosophical reasons why a person may refuse to pay union dues, a union is forced to make an extensive and costly investigation to protect itself from Title VII suits and lost dues.

Further problems result because of the resentment against "free riders" which saps union solidarity and strength. To require dues-paying members to shoulder the expense of non-paying members is understandably unfair when non-paying members continue to receive the same benefits. Both in bargaining and administering an agreement, "free riders" destroy the very stability which union security clauses were designed to achieve.

The state of the law in the dues area is so uncertain today that unions do not know their rights and duties under Title VII. Does anything less than full payment of dues to the union constitute undue hardship? Does payment to a charity of an equivalent amount of union dues constitute reasonable accommodation? Does reasonable accommodation require that the employee be able to choose the charity which will benefit from his dues? Does the law require a union, under pain of a Title VII case like this, to attempt to accommodate an individual when it is obvious that the employee will not accept any accommodation? Questions like these are illustrative of the many recurring problems engendered by the Court of Appeals decision which will continue until this Court resolves the issues involved.

III.

THE DUTY OF REASONABLE ACCOMMODATION MANDATED BY TITLE VII VIOLATES THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT

The First Amendment to the United States Constitution provides in part that "Congress shall make no law respecting an establishment of religion. . . ." This Court on innumerable occasions has reiterated the following principle enunciated in *Everson v. Board of Education,* 330 U.S. 1 (1947):

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another . . . In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and state." *Id.* at 15-16.

Many jurists and commentators have questioned the constitutionality of the duty of reasonable accommodation mandated by Title VII § 701(j), 42 U.S.C. § 2000e(j) and EEOC Regulation 1605.1(c), the legal sources for the imposition of this duty. In *Cummins v. Parker Seal Co.,* 516 F.2d 544 (6th Cir. 1975) (dissenting opinion), affirmed by an equally divided court, 429 U.S. 65 (1976), vacated for further consideration, 433 U.S. 903 (1977), the breach of the wall of separation was fully articulated:

> By Regulation 1605.1 and by 42 U.S.C. § 2000e(j), the Federal Government has

> breached the wall. The Regulation and § 2000e(j) grant preferences to employees by reason of their religion, forcing modifications in seniority systems, overtime scheduling, and other forms of employee organization. . . .
>
> Exemption from uniform work rules for religious reasons has been recognized as an unfair and undue preference under collective bargaining agreements. [citations ommitted]
>
> Granting special privileges because of the exercise of one's religion is just as wrong as denying employment opportunity because of one's religious beliefs. When Government engages in either practice, it discriminates on the basis of religion and abandons its neutrality. *Id.* at 555-556.

Application of the three-part establishment test set forth in *Committee for Public Education v. Nyquist,* 413 U.S. 756 (1973) requires a finding that the reasonable accommodation provision of Title VII violates the Establishment Clause. In *Nyquist,* this Court stated that,

> [T]o pass muster under the Establishment Clause the law in question, first, must reflect a clearly secular legislative purpose, . . . second, must have a primary effect that neither advances nor inhibits religion, . . . and, third, must avoid excessive government entanglement with religion. . . . *Id.* at 773 [citations ommitted]

First, the reasonable accommodation provision lacks a "clearly secular legislative purpose." The legislative history

of the 1972 amendment creating the duty of reasonable accommodation reveals that the amendment was motivated by sectarian impulses rather than by a problem of religious discrimination in employment requiring remedial legislation. Remarks on the floor of the Senate by Senator Jennings Randolph indicate that the purpose of the amendment was to stem the "dwindling of the membership of some religious organizations" which require members to abstain from Saturday work. See 118th Cong. Rec., S 227-229, January 21, 1972. As is apparent from Senator Randolph's remarks, a very obvious and substantial purpose of this amendment was to benefit members of particular religious groups which suffered from sagging membership roles. The statutory purpose to foster religion could not be more clear.

Second, the reasonable accommodation provision has the direct and immediate effect of advancing religion. The law forces a union to discriminate in favor of individual employees on the basis of their religious beliefs by requiring the union to make special allowances for these individuals in contravention of its bona fide union security clause. The provision also imposes its burden on the other employees who are either nonreligious or of different religious persuasions than the accommodated employee. These individuals are forced to assume the accommodated employee's financial obligation to the union in order to keep the union solvent. The preferential effect is obvious; the provisions favor the religious over the nonreligious and advance particular religions. Cf: *Torcaso v. Watkins,* 367 U.S. 488 (1961); *Zorach v. Clauson,* 343 U.S. 306 (1952).

Thirdly and lastly, the reasonable accommodation provision requires pervasive and excessive government

entanglement with religion. *Lemon v. Kurtzman,* 403 U.S. 602 (1971); *Walz v. Tax Commission,* 397 U.S. 664 (1970). The provision necessarily violates this last criterion for both the EEOC and, subsequently, the courts are required to make a determination as to whether the belief asserted is to be characterized as a "religious" belief and whether such a belief, which may be outside a standardized creed, is protected under the law. In addition, these tribunals must determine whether these beliefs are not only sincere but also the actual basis for the refusal to pay union dues. See 44 Fordham L. Rev. 442, 449 n. 61 (1975). Political, ideological or philosophical reasons, no matter how strong, are beyond the protection of the reasonable accommodation provision.

In *National Labor Relations Board v. Catholic Bishop of Chicago,* ___ U.S. ___, 39 CCH S.Ct. Bull. P. B1560 (March 21, 1979) this Court held that there would be a significant risk of infringement of the Religion Clauses of the First Amendment to the United States Constitution if the National Labor Relations Board (N.L.R.B.) exercised jurisdiction over church-operated schools. This risk would occur because resolution of unfair labor charges by the N.L.R.B. would "necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission." *Id.* at B1573. In addition, this Court stated that "[i]t is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but *the very process of inquiry* leading to findings and conclusions." *Id.* at B1573 [emphasis supplied].

In an identical manner with the N.L.R.B. in unfair labor practices cases, the EEOC and subsequently the courts in

reasonable accommodation cases must inquire into the good faith of the employee's alleged religious refusal to pay union dues. They must also determine whether the belief stems from some bona fide religion. As in the case of N.L.R.B. inquiries, the "very process of inquiry" by EEOC and the Courts presents a risk of violation of the rights guaranteed by the Religion Clauses of the First Amendment.

Significantly, in *Catholic Bishop of Chicago v. N.L.R.B.,* 559 F.2d 1112 (7th Cir. 1977), the Court of Appeals noted the similarity between the N.L.R.B.'s entanglement with religion in schools as compared with the EEOC's entanglement with religion under the reasonable accommodation provision of Title VII.

In the instant case, the EEOC, the District Court and the Court of Appeals have done exactly what this Court said would pose a risk of violating the First Amendment. The EEOC inquired into good faith of the respondent's position and subsequently issued a Right to Sue letter. The District Court's inquiry resulted in a holding that respondent's religious beliefs were *not* the basis for his refusal to pay union dues but rather that respondent was motivated by a general distrust of unions. The Court of Appeals made its own inquiry into the respondent's sincerity and religious beliefs and held that respondent's religious beliefs *were* the basis for his refusal to pay union dues. It is just this sort of inquiry, whether it be by the N.L.R.B., the EEOC or the courts, that this Court held may impinge on First Amendment rights.

Because the instant case and *Catholic Bishop of Chicago* parallel each other on the issue of government entanglement

with religion in violation of the First Amendment, *Catholic Bishop of Chicago* should control.

In *Gavin v. Peoples Natural Gas Co.*, ___ F.Supp. ___, 20 DLR D-1 (Lab. Rel. Rep. (BNA) (E.D. Pa. 1979), the District Court held that it could not proceed with the religious discrimination case before it without entangling the court with religious beliefs and thereby "abandoning the constitutionally-mandated 'hands-off' attitude in matters of religion and conscience." *Id.*, 20 DLR at D-6. The Court stated that it shuddered at the possibility of a "courtroom scene wherein experts would be cross-examined as to the legitimacy of a specific religious conviction." *Id.*, 20 DLR at D-6.

Significantly, in *Yott v. North American Rockwell Corp.*, 428 F.Supp. 763 (C.D. Cal. 1977), on remand from the Ninth Circuit Court of Appeals, the District Court was unpersuaded by the majority of the Sixth Circuit in *Cummins*, and held that the religious provisions of the Civil Rights Act of 1964 violate the Establishment Clause of the First Amendment. *Yott*, like the case at hand, was concerned with firing of an employee for his refusal to join or contribute to the union.

In sanctioning union security clauses, Congress recognized that the need for stability in unions and labor must take precedence over an individual's religious beliefs against joining or contributing to a union. By requiring financial core membership only, the rights of these individuals are protected as much as possible. In *Otten v. Baltimore & O. R. Co.*, 205 F.2d 58, 61 (2nd Cir. 1953) Judge Learned Hand pointed out the need for these individuals to accommodate their religious beliefs in stating that:

> The First Amendment protects one against action by the government . . ., but it gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessities . . . We must accommodate our idiosyncracies, religious as well as secular, to the compromises necessary in communal life; and we can hope for no reward for the sacrifices this may require beyond our satisfaction from within, or our expectations for a better world.

IV.

THE CREATION OF A DE NOVO REVIEW BY THE COURT OF APPEALS IN VIOLATION OF RULE 52(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE AND THE ERRONEOUS NATURE OF THE DECISION BELOW REQUIRE THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION TO AVOID RECURRENT PROBLEMS

In construing Rule 52(a) F.R.C.P., this Court held in *United States v. Yellow Cab Co.*, 338 U.S. 338 (1949) in affirming a lower court judgment on direct appeal, that, "[F]indings as to the design, motive and intent with which men act depend particularly upon the credit given to witnesses by those who see and hear them." *Id.* at 341.

In the instant case, the record testimony at the district court level is overwhelming that respondent distrusted unions. His distrust was not based upon his observance of this Union, but based upon his early childhood upbringing in Detroit. The

Union explored at great length the possibility of accomodation including some form of charity substitution. Respondent made no attempt to reply to the Union's offers but merely indicated that he did not trust unions. There is simply no justification for the Court of Appeals to ignore the finding of the District Court that respondent's distrust of unions made accommodation by this Union impossible. In doing so, the Court of Appeals gave no weight to the great advantage the District Court had in seeing, hearing and judging the credibility of the witnesses.

In addition, without the benefit of the trial record, the Court of Appeals adopted an erroneous finding of the District Court that respondent was willing, before the time of his termination, to give money to a charity. Respondent's testimony in the District Court that he would have given money to a charity through General Dynamics was in direct contradiction to his deposition testimony as well as to statements made by respondent to his Union shop committeeman. On cross-examination, respondent, in affirming his deposition testimony, acknowledged that he was not agreeable to a charity substitution at the time of his termination. The Court of Appeals failed to note this.

The Court of Appeals compounded its mistake by misapprehending the landmark decision of another panel of that court in *Yott v. North American Rockwell Corp.*, 501 F.2d 398 (9th Cir. 1974). In *Yott*, as in the instant case, an employee was terminated because he refused, for religious reasons, to pay union dues in violation of a valid union security agreement. In remanding the case to the District Court, the Court of Appeals expressed serious doubt as to whether any

accommodation was possible. The court noted that unlike "a refusal to work" situation in which a reasonable accommodation is easily provided, accommodating a member's objection to paying fees is a considerably more difficult task.

The Ninth Circuit specifically addressed the hardship caused by any accommodation which exempts an employee from paying dues. The court stated:

> We are certain that the court will keep in mind that the purpose of a union security clause is to insure that all who receive the benefits of the collective bargaining agreement pay their fair share. "Free Riders" are discouraged. In effect stability is promoted by reducing potential labor strife, thus increasing the efficient operation of the business. *Id.* at 402, n. 6.

Thus it appears that the Ninth Circuit had precluded any accommodation which would allow a person to obtain the benefits of the union without paying his fair share of the substantial costs of collective bargaining. In the instant case, the Court of Appeals failed to recognize and acknowledge the very serious concerns which formed the basis for its prior decision in *Yott*.

This Court should exercise its supervisory powers not only to ensure that Rule 52(a) is respected in future Title VII religious discrimination cases, but also to correct the court's erroneous finding of fact concerning the charity substitution and to direct the court to re-examine its decision in *Yott*.

On January 8, 1979, certiorari was denied in *Southern Pacific Transportation Co. v. Burns*, 11 FEP Cases 1441 (DC

Ariz. 1976), rev'd, 589 F.2d 403 (1978), cert. denied, 99 S.Ct. 843 (1979), a case somewhat similar to the instant case. However, petitioner respectfully submits that the instant case is distinguishable from *Burns* in three key areas and therefore the denial of certiorari in *Burns* should have no impact on the instant petition for certiorari.

First, unlike the union in *Burns*, the Union in the instant case made several attempts to accommodate respondent. As stated previously in this petition, the Union representative met with respondent on several occasions to discuss possible accommodations including financial core membership or a charity substitution. Respondent adamantly refused both of those possibilities. It is important to note that petitioners were already accommodating respondent's inability to work on his Sabbath as well as on his special religious holidays. The fact that the Union in the instant case has clearly demonstrated a good faith attempt to accommodate respondent makes the instant case a far more appropriate case than *Burns* for this court's review of the reasonable accommodation provision of Title VII.

Secondly, the District Court in *Burns* found sufficient evidence that the employee's refusal to pay union dues was based on his sincere religious belief that the teachings of his Church prohibited him from joining or contributing to a labor organization. The Court of Appeals then accepted this finding.

On the contrary, the District Court in the instant case found that respondent's refusal to join or contribute to the Union was based on his general distrust of unions rather than on his religious beliefs. As noted earlier in this petition, the Court of

Appeals ignored this finding of the District Court and made its own inquiry into respondent's sincerity.

This factual difference between the *Burns* case and the instant case highlights the very type of inquiry into the sincerity of religious beliefs that this Court held in *Catholic Bishop of Chicago* was very likely to lead to a violation of the Religion Clauses of the First Amendment.

Finally, petitioners in *Burns* failed to raise the First Amendment argument that petitioners in the instant case have raised. In *Burns*, the union did not raise the First Amendment argument at the District Court level, attempted to raise it at the Court of Appeals level, but dropped it in their petition for certiorari.

On the contrary, the Union in the instant case properly raised, briefed and argued the First Amendment issue at the District Court and Court of Appeals levels as well as in this petition for certiorari. Unlike *Burns*, the instant case squarely raises the First Amendment argument for this Court's review. Given the fact that *Catholic Bishop of Chicago*, the most recent labor case dealing with the First Amendment issue, has been decided since the denial of certiorari in *Burns*, the significant differences between the petition for certiorari in *Burns* and the instant case are sufficient to warrant the granting of the petition.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

OLINS & FOERSTER

By: DOUGLAS F. OLINS

Counsel for Petitioner,
Silvergate District Lodge 50,
International Asociation of
Machinists and Aerospace
Workers, AFL-CIO

Appendices

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DAVID ANDERSON, Plaintiff, vs GENERAL DYNAMICS CONVAIR AEROSPACE DIVISION, a Corporation, and INTER-NATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, Silvergate District Lodge 50, An Association, Defendants.	NO. 75-0857-S MEMORANDUM

APPEARANCES:
For Plaintiff - Kevin J. McInerney, San Diego, California
For Defendant, General Dynamics - Ward W. Waddell, Jr. San Diego, California
For Defendant, Union - Douglas F. Olins, San Diego, California

DENNEY, District Judge[1]

This matter is before the Court for determination on the merits, subsequent to trial to the Court on February 2, 1977, and the submission of post-trial briefs. In accordance with Fed.R.Civ.P. 52(a), the Court makes the following findings of facts and conclusions of law.

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[1]United States District Judge, District of Nebraska, sitting by designation.

I.

Plaintiff, David Anderson, instituted this action on October 3, 1975, pursuant to Title VII of the 1964 Civil Right Act, against General Dynamics Convair Aerospace Division [hereinafter referred to as General Dynamics] and Silvergate District Lodge 50, International Association of Machinists and Aerospace Workers, AFL-CIO [hereinafter referred to as the Union]. The court has jurisdiction under the provisions of 42 U.S.C. §2000e-5(f) et seq., as amended March 24, 1972, and 28 U.S.C. §1343(4).

This case involves the termination of plaintiff by General Dynamics pursuant to the request of the Union, for his failure to join or contribute to the Union. Plaintiff claims a violation of Title VII of the Civil Rights Act of 1964, as amended, based upon defendants' failure to accommodate his religious beliefs. Plaintiff seeks reinstatement of employment and benefits, an injunction restraining the Union from discriminating against him, back pay and allowances, reasonable attorney's fees, costs and interest.

Anderson was employed on a regular basis by defendant, General Dynamics, from October 11, 1956, until June 16, 1972. At the time of his termination, plaintiff was a process tank loader and tender.

Since 1959, Anderson has been a member of the Seventh Day Adventist Church. Between 1959 and April 3, 1972, the collective bargaining agreement between defendants did not require General Dynamics to employ only those persons who were members of the Union. On April 3, 1972, the Union entered into an employment contract on behalf of represented employees with General Dynamics. Article 9, Paragraph B of the Agreement, provided as follows:

> Any employee on the company's active payroll who is in the bargaining unit and is not a member of the Union on 3 April, 1972, shall, as a condition of continued employment in the bargaining unit, join the Union within ten (10) days after the thirtieth (30th) day following the effective date of this agreement, and shall maintain his membership as provided in Paragraph A above.

It is a tenet and principle of the Seventh Day Adventist Church, that its church members should not belong to any monopolistic business enterprise. Although the decision not to join or support a labor organization is left to the individual church member, Anderson has at all material times adhered to the conviction that joining or contributing to a labor union violates the principles and tenets of the Church. Anderson therefore did not join the Union within the time prescribed by the Union security clause.

On May 25, 2972, the Union notified plaintiff as to his delinquency relative to the requirements of the Union security provisions. Thereafter, on June 12, 1972, Anderson informed General Dynamics, who in turn informed the Union, that his religious beliefs prohibited him from joining the Union.[2] Two days later, the Union sent a letter to General Dynamics requesting that plaintiff be discharged for failure to join the Union. On or about June 14, 1972, upon receiving notice that he would be terminated unless he joined the Union, plaintiff again informed General Dynamics that his religious convictions would not allow him to join the Union. The parties have stipulated that neigher [*sic*] defendant "offered any specific alternatives or accommodations with respect to joining the Union. Mr. Anderson was informed by both defendants that he had to follow the collective bargaining agreement and join the Union."[3]

On September 27, 1972, Anderson filed a Charge of Discrimination against both defendants with the Equal Employment Opportunity Commission. On November 6, 1972, the Commission deferred the complaint to the California Fair Employment Practice Commission.

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[2]Exhibit D-1.

[3]Pre-trial conference Order §2, para. 21.

The matter was referred back to the Commission on December 6, 1972, and on April 12, 1974 decision was entered finding reasonable cause to believe that plaintiff's charge of discrimination was true and that plaintiff was entitled to relief. On July 15, 1975, the Commission notified plaintiff that conciliation efforts had failed and a "Notice of Right to Sue Within 90 days" was received by plaintiff on October 14, 1975.

II.

The principal issue before the Court is whether the defendants could have accommodated plaintiff's religious beliefs without undue hardship on their businesses.[4]

At the outset, it should be noted that Congress has sanctioned union security agreements as an integral part of our labor relations policy. The National Labor Relations Act, as amended by Section 8(a)(3) of the Labor Management Relations Act (Taft Hartley Act), 29 U.S.C. §158(a)(3), provides in relevant part:

> [N]othing in this subchapter . . . shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such

[4]Although both defendants have raised in their answers several legal defenses as a bar to plaintiff's action, the Court deems such defenses abandoned for failure to brief the issues pursuant to the Local Rules of the Southern District of California.

[5]Although plaintiff argued in his pre-trial brief that Section 8(a)(3) sanctions only agency shops and not union shops, this contention was withdrawn at pre-trial conference. The parties have agreed that the union security clause is valid and consistent with Section 8(a)(3) of the NLRA in that union membership is not a condition for acquiring employment, but merely a condition of continued employment. (Pre-trial Conference Order §III, para. 13). *See N.L.R.B. v. General Motors Corp.*, 373 U.S. 734 (1963).

42 U.S.C. §2000e-2(a) provides in part as follows:

> It shall be an unlawful employment practice for an employer--
> (1) to fail or refuse to hire or to discharge any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; . . . .

42 U.S.C. §2000e-2(c) provides in relevant part as follows:

> It shall be an unlawful employment practice for a labor organization--
> . . . .
> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this Section.

In 1972, Congress enacted 42 U.S.C. §2000e(j) which incorporated the substance of the 1967 E.E.O.C. guidelines found at 29 C.F.R. §1605.1:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's religious observance or practice without undue hardship on the conduct of the employer's business.

Although Section 8(a)(3) of the NLRA and Title VII collide in cases such as presented herein, the Ninth Circuit has held that when a union security clause conflicts with freedom of religion, reasonable accommodation is required. *Yott v. North American Rockwell Corp.*, 501 F.2d 398, 402 (9th Cir. 1974). This Court is therefore squarely presented with the difficult task of balancing the rights and interests of the parties.

Defendants initially argue that plaintiff has failed to meet his burden of proof, inasmuch as he did not offer General Dynamics any suggested accommodation prior to termination. Although defendants correctly state that Judge Manuel Real placed the burden

of initiating accommodations discussions with the employee in *Yott v. North American Rockwell,* ___ F.Supp. ___ (C.D. Calif. 1977) (on remand), the Ninth Circuit specifically held in *Yott* that "if a reasonable accommodation can be reached between the parties, it must be offered appellant Yott. . . ." 501 F.2d at 402, n. 6. On the other hand, plaintiff argues that he is entitled to judgment as a matter of law, since it is stipulated that neither defendant tendered plaintiff an offer of accommodation.[6]

The Court is impelled to reject the contentions of both parties. The controlling question does not turn on subtle procedures which require a party to come forward with an offer of accommodation prior to termination;[7] the touchstone of religious discrimination under the Act is whether a reasonable accommodation can, in fact, be reached between the parties without undue hardship. It would be anomolous to compel an employer and union to accommodate an employee's religious beliefs, regardless of hardship, simply because the employer failed to offer the employee any accommodations prior to his termination, regardless of whether, in fact, a reasonable accommodation is available. This result would not only be contrary to logic, but in direct conflict with the statutory command which exonerates "an employer who demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. §2000e(j).

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[6]The Eighth Circuit held in *Hardison v. TransWorld Airlines, Inc.,* 527 F.2d 33, 39 (8th Cir. 1975) *cert. granted* ___ U.S. ___ (1976), "[b]efore an employer can assert the defense of non-cooperation, it is incumbent upon it to establish the accommodation which it has tendered and with which the employee refused to cooperate."

[7]A common sense interpretation of the Act dictates a conclusion that the employer is required to initiate a conference with employee prior to termination to discuss possible accommodation to the employee's religious beliefs. An acceptance of defendants' position would defeat the conciliation powers of the Commission. *See* 29 C.F.R. §1601.22.

The parties have stipulated that Anderson "had made known to his fellow workers, including his shop committeeman, the fact that he would not join and/or support the Union except if he could insure that his contributions went to a recognized charity that met with his approval.[8] Plaintiff testified that he told the Union committeeman, Joe Mattson, prior to his termination that he did not mind paying the equivalent of Union dues if he could give it directly to a charity. Plaintiff further stated that he would not make payments for a charity to the Union because he doesn't trust unions. The following statement from Anderson's deposition is particularly relevant:

> Anyhow, the committeeman told me, "what about, you know, paying union"--not paying union dues, less so much of my money be taken out of my check and go to charity. And I told him the same thing I'm telling you now, that they tells you that but they don't do that. So I told him, "I don't mind paying the union dues or paying the fee in the same amount, but I would not, you know, let the union do it.[9]

In *Yott v. North American Rockwell Corporation, supra,* the Ninth Circuit reversed the dismissal of plaintiff's complaint and remanded the case to the district court for a determination of whether a reasonable accommodation without undue hardship could be reached. In a footnote, the court described the remand:

> [W]e leave analysis of whether the "business necessity" test would be met for the District Court's determination. We are certain that the court will keep in mind that the purpose of a union security clause is to insure that all who receive the benefits of the collective bargaining agreement pay their fair share. "Free riders" are discouraged. In effect, stability is promoted by reducing potential labor

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[8]Pre-trial Conference Order, §III, para. 25.

[9]Deposition III:20-26.

> strife, thus increasing the efficient operation of the business. 501 F.2d at 402, n. 6.[10]

Although the law in some circuits is unsettled as to whether harship to the union, as well as to the employer, can be considered,[11] the law in this circuit mandates that the inquiry on hardship include hardship to the union. *Yott v. North American Rockwell Corp., supra* at 403.

In consideration of the above authorities and the interests of the parties, the Court must conclude that anything less than payment of the equivalent of dues to the Union for charitable purposes would impose an undue hardship on the Union. Nonpayment of dues or the equivalent deprives the Union of money needed in order to negotiate on behalf of employees and to which it is entitled for services rendered.[12] Plaintiff's refusal to give the equivalent of dues to the Union to be earmarked for a recognized charity of his own selection was based on his general distrust of unions, rather than on religious beliefs. The willingness of plaintiff to pay money directly to a charity does not eliminate "free riders."[13] The overriding interest of the

[10]The court also expressed doubt as to whether any accommodation was available, upon the assumption that appellant, like Anderson, may not desire to pay an amount equal to union dues to the union.

[11]*See*, e.g., separate opinions or [*sic*] Judge Gee, Judge Brown and Judge Rives, in *Cooper v. General Dynamics, Convair Aerospace Division*, 533 F.2d 163 (5th Cir. 1976).

[12]Although not dispositive, the Court notes that plaintiff has on two occasions utilized the Union's grievance procedure to secure reinstatement in 1962 and 1968 when terminated because he refused to work on the Sabbath of his church.

[13]*See* S. Rep. No. 105 on S. 1126, 80th Cong. 1st Sess. 7 (1947).

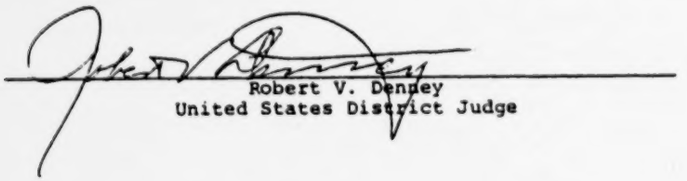
Union in carrying out its bargaining function with sufficient funds makes an accommodation impossible, given plaintiff's unyielding position.[14]

Since the Court holds that an accommodation is impossible under the circumstances of this case, it is unnecessary to reach defendants' claim that Title VII violates the Establishment Clause of the First Amendment.

Judgment shall be entered for defendants.

Dated this 15th day of February, 1977.

BY THE COURT



Robert V. Denney
United States District Judge

[14]It should be noted that the Union donates money to charities in the amount of approximately 36¢ per year for each member.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DAVID ANDERSON,

Plaintiff,

vs

GENERAL DYNAMICS CONVAIR AEROSPACE DIVISION, a Corporation, and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, Silvergate District Lodge 50, An Association,

Defendants.

NO. 75-0857-S

JUDGMENT

In accordance with the Memorandum Opinion filed contemporaneously herewith,

IT IS HEREBY ORDERED that judgment be entered for defendants, each party to pay their own costs.

IT IS FURTHER ORDERED that the motion of defendant, International Association of Machinists and Aerospace Workers, AFL-CIO, Silvergate District Lodge 50, An Association, for summary judgment is denied as moot.

Dated this 15th day of February, 1977.

BY THE COURT

Robert V. Denney
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID ANDERSON,

Plaintiff-Appellant,

v.

GENERAL DYNAMICS CONVAIR AEROSPACE DIVISION, a corporation, and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, SILVERGATE DISTRICT LODGE 50, an association,

Defendants-Appellees.

No. 77-2180

OPINION

Appeal from the United States District Court
for the Southern District of California

Before: HUFSTEDLER and GOODWIN, Circuit Judges, and LUCAS,* District Judge

HUFSTEDLER, Circuit Judge:

Anderson, a former employee of General Dynamics Convair Aerospace Division ("General Dynamics") brought this Title VII action against General Dynamics and the International Association of Machinists and Aerospace Workers, AFL-CIO, Silvergate District Lodge 50 ("Union"), claiming that he had been discharged in violation of the religious discrimination provisions of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-2(a) and 42 U.S.C. § 2000e(j)). He sought reinstatement of employment and benefits, an injunction restraining the Union from discriminating against him,

*Honorable Malcolm M. Lucas, United States District Judge, Central District of California, sitting by designation.

back pay and allowances, reasonable attorney's fees, costs and interest. The district court held that no accommodation to Anderson's religious beliefs was possible because his offer to contribute the amount of Union dues to a charity of his choice, rather than to the Union or charities of the Union's choice, imposed an undue hardship on the Union. (*Anderson v. General Dynamics Convair Aerospace Division* (C.D. Cal. 1977) 430 F. Supp. 418.)

The critical issue on appeal is whether the Union carried its burden of proving that it could not reasonably accommodate Anderson's religious convictions without undue hardship on the Union. We conclude that it did not carry its burden of proof.

Anderson was first employed by General Dynamics on October 11, 1956. In 1959, he became a member of the Seventh Day Adventist Church. A tenet of the Church is that its members should not belong to or contribute to labor organizations. Anderson has at all material times held a sincere belief in that tenet. From 1959 until April 3, 1972, the collective bargaining agreement between General Dynamics and the Union did not require General Dynamics to employ only / / persons who were union members. On April 3, 1972, however, the Union and General Dynamics entered into a collective bargaining agreement, which contained the following provision:

> "Any employee on the Company's active payroll who is in the bargaining unit and is not a member of the Union on 3 April, 1972, shall, as a condition of continued employment in the bargaining unit, join the Union within ten (10) days after the thirtieth (30th) day following the effective date of this agreement, and shall maintain his membership as provided in Paragraph A above."

Anderson did not join the Union within the time limitation provided by the security clause of the bargaining agreement. On May 25, 1972, the Union notified Anderson of his delinquency under the agreement. On June 12, 1972, Anderson informed General Dynamics,

which, in turn, informed the Union, that his religious beliefs prohibited him from joining the Union. Two days later, the Union requested that Anderson be discharged for failure to abide by teh provisions of the security clause. On June 16, 1972, General Dynamics discharged Anderson from his employment for the sole reason that he refused to become a member of or contribute to the Union.

The parties stipulated that neither the Union nor General Dynamics offered Anderson any specific alternatives or accommodations with respect to joining the Union, and both the Union and General Dynamics told Anderson that he had to follow the collective bargaining and join the Union. The parties also stipulated that Anderson had made known to his fellow workers, including his shop committeeman, that he would not join the Union and that he would not contribute to the Union, unless he could insure that his contributions went to a recognized charity.

Anderson promptly filed a complaint with the Equal Employment Opportunity Commission, which deferred the matter to the California Fair Employment Practice Commission ("FEPC"). The FEPC referred the case back to the EEOC. After finding reasonable cause to believe that Anderson's discrimination charge was well-founded, the EEOC attempted conciliation. When conciliation failed, EEOC issued a right to sue letter on October 5, 1975. Anderson timely filed a complaint in the district court. The district court rendered judgment against him, and he appeals.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) provides in pertinent part as follows:

> "It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin. . . ."

Similar conduct by a labor organization is also proscribed by the Act. (42 U.S.C. § 2000e-2(c).)[1]/

In 1972, Congress enacted 42 U.S.C. § 2000e(j), incorporating the substance of teh 1967 EEOC guidelines (29 C.F.R. § 1605.1). The section provides:

> "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."

As the Supreme Court has explained, in *Trans World Airlines, Inc. v. Hardison* (1977) 432 U.S. 63, 74: "The intent and effect of this definition was to make it an unlawful employment practice under § 703(a)(1) for an employer [and also for a union] not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees."

1. Section 2000e-2(c) provides as follows:

"It shall be an unlawful employment practice for a labor organization--

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section."

Neither Congress nor the EEOC has attempted to spell out any precise guidelines for determining when the "reasonable accommodations" requirement has been met, nor the kinds of circumstances under which a particular accommodation may cause hardship that is "undue." These decisions must be made in the particular factual context of each case because the decision ultimately turns on the reasonableness of the conduct of the parties under the circumstances of each case. (*Redmond v. GAF Corp.* (7th Cir. 1978) 574 F.2d 897, 902-03; *Williams v. Southern Union Gas Co.* (10th Cir. 1976) 529 F.2d 483, 489. *Cf. Trans World Airlines, Inc. v. Hardison, supra,* 432 U.S. at 74-75.)

We, as well as other courts, have recognized that there is both tension and conflict between the legitimate interests of the Union in preserving the benefits of union security agreements, which are valid under the National Labor Relations Act (29 U.S.C. § 158), and the accommodation requirements of Title VII (*e.g., Yott v. North American Rockwell Corporation* (9th Cir. 1974) 501 F.2d 398; *McDaniel v. Essex Intern'l, Inc.* (6th Cir. 1978) 571 F.2d 338; *Cooper v. General Dynamics, Convair Aerospace Division* (5th Cir. 1976) 533 F.2d 163, 166-69). The balance has been struck, however, in favor of the elimination of discrimination in employment practices and requiring accommodation of religious practices absent proof by the Union, the employer, or both, that reasonable accommodation cannot be made without an undue hardship to the Union or to the employer. (*Trans World Airlines, Inc. v. Hardison, supra,* 432 U.S. 63; *McDonald v. Santa Fe Trail Transportation Co.* (1976) 427 U.S. 273; *Franks v. Bowman Transportation Co.* (1976) 424 U.S. 747.)

To establish a prima facie case of discrimination under §§2000e-2(a)(1) and (j) Anderson had the burden of pleading and proving that (1) he had a bona fide belief that union membership and

the payment of union dues are contrary to his religious faith;[2]/ (2) he informed his employer and the Union about his religious views that were in conflict with the Union security agreement; and (3) he was discharged for his refusal to join the Union and to pay union dues. (*E.g., Yott v. North American Rockwell Corp., surpa,* 501 F.2d 398; *Redmond v. GAF Corp., supra,* 574 F.2d at 901.)[3]/ Both by stipulations of fact and by evidence introduced at trial, Anderson established his prima facie case.

The burden was thereafter upon General Dynamics and the Union to prove that they made good faith efforts to accommodate Anderson's religious beliefs and, if those efforts were unsuccessful, to demonstrate that they were unable reasonably to accommodate his beliefs without undue hardship. *Id.* at 902.

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2. We have no occasion in this case to determine the breadth of the "beliefs" or "practices" protected by section 2000e(j) or to grapple with bona fides of a particular employee's religious convictions. Both of these facts are conceded for the purpose of this case. We are aware, however, of the Supreme Court's admonition in Fowler v. Rhode Island (1953) 345 U.S. 67, 70 that "it is no business of courts to say . . . what is a religious practice or activity. . . ." *See also* Redmond v. GAF Corp., *supra,* 574 F.2d at 900.

3. We agree with the Seventh Circuit that the employee who has provided his employer with sufficient information to put it on notice of his religious needs is not required, as part of his prima facie case, to show that he thereafter made some efforts either to compromise or accommodate his own religious beliefs before he can seek an accommodatin from his employer. (Redmond v. GAF Corp., *supra,* 574 F.2d at 901-02 ("While we feel plaintiff should be free, even encouraged, to suggest to his employer possible ways of accommodating his religious needs, we see nothing in the statute to support the position that this is part of plaintiff's burden of proof." *Id.* at 901.)

Neither the Union nor General Dynamics did anything to accommodate Anderson's religious beliefs. They contend that their failure to take any steps to accommodate is excused because Anderson insisted on making an equivalent payment to a charity of his choice, rather than paying the equivalent fund to the Union for charitable purposes. They rely heavily upon the district court's finding that Anderson's refusal to pay his charitable contribution to the Union was based on his general distrust of unions, rather than on religious beliefs. Finally, they argue that Anderson's suggestion of accommodation would work undue hardship as a matter of law because Anderson would become a "free rider."

The burden was upon the appellees, not Anderson, to undertake initial steps toward accommodation. They cannot excuse their failure to accommodate by pointing to deficiencies, if any there were, in Anderson's suggested accommodation. Thus, Anderson's motivation in selecting his own charity is irrelevant. Moreover, the district court's finding is contrary to the parties' stipulation of fact that teachings of Anderson's Church forbade making contributions to unions.

Appellees are left with the argument that Anderson's refusal to pay either his union dues or the equivalent of union dues to the Union for a charity of the Union's choice would be an undue hardship as a matter of law because the means of accommodation would create "free riders." The district court accepted this argument; we do not. We follow the Sixth Circuit in *McDaniel v. Essex International, Inc., supra,* 571 F.2d 338, with which our case is almost identical.

McDaniel was a Seventh Day Adventist who had a bona fide religious belief that membership in the union and the payment of union dues was a violation of her religion. She requested her employer and the union to make an accommodation to her religious beliefs, and she suggested that she would be willing to contribute an

amount equal to the union dues to a non-sectarian charity to be chosen by the union and her employer. Neither responded to her request, and she was discharged for her failure to adhere to the requirements of the union security agreement. The district court granted summary judgment in favor of the union and the employer, accepting their contentions that teh accommodation that the employee suggested would work an undue hardship on the union as a matter of law because non-payment of union dues adversely affected the "financial core" of the union and thus impaired its ability to fulfill its collective bargaining functions. The *McDaniel* court reversed. The court pointed out that the union security provisions of the Taft-Hartley Act (29 U.S.C. § 158(a)(3), (b)(2) (1970)) "do not relieve an employer or a union of the duty of attempting to make reasonable accommodation to the individual religious needs of employees. [citations omitted]. The burden is on Essex and IAM to make an effort at accommodation and, if unsuccessful, to demonstrate that they were uanble to reasonably accommodate the plaintiff's religious beliefs without undue hardship. The district court found that it would work an undue hardship on IAM to forego the dues payment by the plaintiff. There is no factual basis in the record for this conclusion. In *Draper v. U.S. Pipe & Foundry Co., supra* [(6th Cir. 1976) 527 F.2d 515], this court expressed its skepticism concerning 'hypothetical hardships' based on assumptions about accommodations which have never been put into practice. 527 F.2d at 520." (*Id.* at 343.)

Here, as in *McDaniel*, neither the Union nor the employer offered any evidence to prove that union members thought that a person was a free rider if he paid the equivalent of union dues to a charity, nor was there any evidence offered to prove as a fact that the accommodation of Anderson would otherwise have been an unduly difficult problem for the Union. It relied simply upon general sentiment against free riders.

Undue hardship means something greater than hardship. Undue hardship cannot be proved by assumptions nor by opinions based on hypothetical facts. Even proof that employees would grumble about a particular accommodation is not enough to establish undue hardship. As the Supreme Court pointed out in *Franks v. Bowman, supra*, 424 U.S. at 775, *quoting United States v. Bethlehem Steel Corp.* (2d Cir. 1971) 446 F.2d 652, 663: "'If relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed.'"[4/]

We conclude that the Union and General Dynamics failed to carry their burden of proof, and, accordingly, the judgment must be reversed.[5/] We also conclude that Anderson is entitled to a reasonable attorney's fee as part of his costs, pursuant to 42 U.S.C. § 2000e-5(k), the amount of which shall be fixed by the district court on remand.

Reversed and remanded for further proceedings consistent with the views herein expressed.

---

4. Appellees can take no comfort from the observation in Yott v. North American Rockwell Corp., *supra*, 501 F.2d at 403: "If appellees are able to demonstrate that any suggested accommodation would impose undue hardship on the Union or the employer's business, then Yott's discrimination claim should fail." We reversed in *Yott* because the appellees had not demonstrated that the suggested accommodation would impose undue hardship, and, as we have explained, the appellees in this case have not done so either.

5. The appellees attacked the constitutionality of the provisions of Title VII in issue in this case, and they renew that attack, at least obliquely, on appeal. The district court did not reach any constitutional issue, and under these circumstances we also decline to address any constitutional questions.

In The

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1650

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, SILVERGATE DISTRICT LODGE 50, An Association,

Petitioner,

v.

DAVID ANDERSON,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INDEX

List of Authorities

Cases: Page

List of Authorities — (Continued)

Cases Page

Statutory Authority:

List of Authorities — (Continued)

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent, David Anderson, herein called "Anderson", hereby files his opposition to granting the Petition for Writ of Certiorari in the above-captioned matter of the International Association of Machinists and Aerospace Workers, AFL-CIO, Silvergate District Lodge 50, herein called "IAM".[1]

[1] The style in the Petition for Writ of Certiorari was printed to carry forward all parties below. However, only counsel for IAM has perfected a Petition for Certiorari. See, JURISDICTION.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 589 F2d 397. The opinion of the United States District Court for the Southern District of California is reported at 430 F.Supp. 418. Both Opinions, along with the Judgment of the District Court, are reproduced in the Appendix of the Petition for Cert., A-1 thru A-10 and B-1 thru B-9. The opinion of the companion case, *Burns v. Southern Pacific Transportation Company, et al* is reported at 589 F2d 403, cert. den'd. sub nom. *Southern Pacific Transportation Company, et al v. Burns,* ____ U.S. ____, 59 L.Ed.2d [illegible] (1979).

JURISDICTION

The Court of Appeals entered judgment on September 7, 1978. The IAM applied for an extension of time to file a Petition for Rehearing and Rehearing In Banc which was granted. Thereafter, the IAM, but not General Dynamics, timely filed its Petition for Rehearing and Rehearing In Banc which was denied on January 16, 1979, and a Petition for Certiorari was filed by the IAM within 90 days of that date. The jurisdiction of this Court is properly conferred, as to the IAM only, under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Did the IAM carry its burden of proof to show a reasonable accommodation to this employee's religious beliefs could not be made without undue hardship?

2. Did the IAM properly preserve its attack on the constitutionality of § 701(j) of the Equal Employment Opportunity Act of 1972 (42 U.S.C. § 2000e(j)); and, if so, does the statutory duty of reasonable accommodation on the IAM violate the

Establishment Clause of the First Amendment to the Constitution?

STATUTORY PROVISIONS INVOLVED

The relevant provisions of 29 U.S.C. § 158(a)(3) are set forth in the Petition for Cert. (Pet. 3).

The Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e, et seq., provides in relevant part as follows —

Section 701(j) states:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

Section 703(a) states in pertinent part:

> It shall be an unlawful employment practice for an employer —
>
> (1) . . . otherwise to discriminate against any individual with respect to his . . . terms, conditions, or privileges of employment, because of such individual's . . . religion . . .; or
>
> (2) to limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . religion . . .

Section 703(c) states in pertinent part:

> (c) It shall be an unlawful employment practice for a labor organization —
>
> (1) . . . otherwise to discriminate against any individual because of his . . . religion . . .; or
>
> (2) to limit, segregate, or classify its membership . . . in

any way which would deprive or tend to deprive any individual of employment opportunities, or . . . otherwise adversely affect his status as an employee . . . because of such individual's . . . religion . . .; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

COUNTER-STATEMENT OF THE CASE

Anderson has been an employee of General Dynamics Convair Aerospace Division since October 11, 1956. He was discharged June 16, 1972, after almost 16 years of service, at the request of the IAM. For many years, the IAM has represented a bargaining unit of which Anderson is a member. Between 1959 and 1972 General Dynamics and IAM had in effect a collective bargaining agreement concerning the wages, hours and working conditions of employees similarly situated as Anderson.

In 1972, General Dynamics and the IAM agreed to a union security clause providing that all employees in Anderson's collective bargaining unit must, as a condition of continued employment, join the union within 10 days after the 30th day following the effective day of the collective bargaining agreement. This agreement became effective April 3, 1972, but as of June 14, 1972 Anderson had not become a member of the IAM. Anderson's termination was requested by the Union on June 14, 1972, and effectuated by the Company two days hence for failure to become a member of or pay monies to the IAM. Anderson's termination resulted solely from his refusal to become a member of or contribute monies to the IAM.

Since 1959, Anderson has also been a member of the Seventh-Day Adventist Church. He subscribes to the Church's teaching against joining or contributing monies to a labor organization.

The Seventh-Day Adventist Church teaches its members that to join or contribute monies to a labor organization violates the principles and tenets of the Bible as interpreted by the Church. However, the decision not to join and/or support a labor union is a growth process left to the individual conscience of each member. A Seventh-Day Adventist who does not understand the teachings of the Church regarding labor unions will not be disfellowshipped for an association, but once an Adventist understands those teachings, he places his eternal salvation in jeopardy by contributing monies to a union.

Previous to his discharge, neither the IAM nor General Dynamics offered Anderson any alternatives or accommodations with respect to his religious beliefs. Anderson was advised only that he was required to subscribe to the union security agreement between General Dynamics and the IAM or be fired. The Church forbids its members from joining or financially supporting any union based on its interpretation of the Bible, Spirit of Prophecy, Law of God, and Baptismal Vows. Anderson sincerely believes individually the teachings of the Church, and construes literally the teachings of the Seventh-Day Adventist. Anderson has offered to pay the equivalent of the union dues and assessments to a designated charity, but he is not willing to pay the monies through the union. He is prepared to offer proof to the Union of the charity payments.

In response to the foregoing, Anderson requested an accommodation of his religious beliefs be made by allowing him to pay the equivalency of union dues to an agreed upon charity (a form of accommodation which has been coined "charity-substitution"). Failing to secure the request and accommodation, he was fired on June 16, 1972. Thereafter, Anderson filed

charges with the Equal Employment Opportunity Commission on September 27, 1972. On November 6, 1972, the EEOC referred the Complaint to the California Fair Employment Practice Commission, the appropriate state agency regulating employment practices. The state agency, in turn, referred the matter back to the jurisdiction of the EEOC on December 6, 1972, and on April 2, 1974, a decision was entered finding reasonable cause to believe that the IAM had violated Anderson's statutory rights under Title VII. Thereafter, Anderson timely filed suit in the United States District Court for the Southern District of California sitting in San Diego, California on October 3, 1975.

On October 16, 1975, Anderson filed his First Amended Complaint seeking reinstatement, back pay, attorney's fees, and injunctive relief against General Dynamics and the IAM. The case was tried before the court without a jury, resulting in a judgment against him, and Anderson appealed to the Ninth Circuit Court of Appeals.

On appeal before the Ninth Circuit, the Court held that Anderson, to establish a *prima facie* case of discrimination under Title VII, must plead and prove: (1) he had a bona fide belief that payment of union dues was contrary to his religious faith; (2) inform the IAM that his religious views were in conflict with the union security agreement; and (3) he was discharged for his refusal to join or pay monies to the IAM. The case at the trial court proceeded to trial only after extensive stipulations were reached by the parties and approved by the court. The Ninth Circuit held that Anderson, both by stipulation of fact and presentation of evidence, had established his *prima facie* case. Thereafter, the court held the burden was on

the IAM to prove that it could not accommodate Anderson's religious beliefs without undue hardship. The appellate court held that the parties had stipulated as to the sincerity of Anderson's religious beliefs, and approved the findings by the trial court that these beliefs were the basis of his refusal to pay dues to the union and the result of his discharge. The court further held that the IAM had only obliquely raised its attack on the constitutionality of 701(j), and, thus, declined to reach any constitutional question.

The Union on appeal urged affirmance on the finding by the trial court that Anderson's refusal to pay the equivalent of union dues to a charity, to the union for distribution, was based on distrust of unions in general. The circuit court dealt squarely and directly with this contention, as well as the other arguments of the IAM, and held that the IAM had not carried its burden to accommodate or to demonstrate undue hardship. In reversing the district court, the appellate court found the IAM had made no effort to accommodate Anderson's particular religious beliefs. Further, the Ninth Circuit rejected the argument that failure of charity-substitution payments, to the union, for charitable purposes was an undue hardship as a matter of law. Finally, the Court held that the evidence offered did not demonstrate that undue hardship under the facts in this case, in fact, existed.

Thus, the IAM seeks certiorari on the very limited issues of (1) whether they carried their burden of proof that undue hardship in fact existed despite their admitted failure to offer any accommodation; or (2) whether the statutory duty of reasonable accommodation on the IAM violates the Establishment Clause of the First Amendment to the Constitution.

ARGUMENTS GRANTING THE WRIT

I. ***No conflict exists between the Ninth Circuit Court of Appeals and the Supreme Court, or among the circuit courts, that the Union has the burden to attempt accommodation unless they demonstrate undue hardship.***

A.

The Ninth Circuit correctly held that the IAM failed to carry its burden of proof.

The Petitioner suggests on Page 18 of its Brief that the state of the law is uncertain and the unions do not know their duties under Title VII. The IAM says the holding by the Ninth Circuit in the instant case runs afoul of the teachings of *Trans World Airlines v. Hardison* 432 U.S. 63 (1977). The IAM says, finally, the Ninth Circuit did not understand its own teachings in *Yott v. North American Rockwell* 501 F.2d 398 (CA 9, 1974), or *Burns v. Southern Pacific Transportation Company, et al* 589 F.2d 403 (CA 9, 1978) cert. den'd. (78-706) sub nom. *Southern Pacific Transportation Company, et al v. Burns* ____ U.S. ____; 59 L.Ed.2d 38, 99 Sup. Ct. 843 (1979).

The Ninth Circuit in the instant case necessarily found that the IAM failed to carry its burden of proof. This holding was consistent not only with its other holdings, but consistent with every circuit court to write on the subject.

[1] Interpreting 29 CFR 1605.1, the genesis to 701(j), in 1974, the Ninth Circuit said:

> "Thus we agree with *Reid* and find that accommodation is required . . If appellees are able to demonstrate that any suggested accommodation would impose undue hardship . . . . *Yott* 501 F.2d at 403."

Interpreting the burden under 701(j), in the instant case, the Ninth Circuit said:

> "The burden was thereafter on General Dynamics and the Union to prove that they made good faith efforts to accommodate Anderson's religious beliefs, and if those efforts were unsuccessful, to demonstrate that they were unable to reasonably accommodate his beliefs without undue hardship." (citations omitted) 589 F.2d at 401. . . . Appellees can take no comfort from the observation in *Yott v. North American Rockwell Corp., supra,* 501 F.2d 403 "if Appellees are able to demonstrate that any suggested accommodation would impose undue hardship on the Union or the employer's business, then Yott's discrimination claim should fail". We reversed in *Yott* because the Appellee had not demonstrated that the suggested accommodation would impose undue hardship, and, as we have explained to the Appellees in this case (meaning *Anderson*) have not done so either." 589 F.2d at 402, n. 4.

Interpreting the burden in *Burns,* the Ninth Circuit said:

> "Thereafter the burden was on the Company and the Union to prove that they made good faith efforts to accommodate Burns' religious beliefs, that the efforts were unsuccessful, and that they were unable reasonably to accommodate those beliefs without undue hardship. (42 U.S.C. 2000e(j)); *Anderson v. General Dynamics Convair Aerospace Division, supra.*" 589 F.2d at 405.

The Ninth Circuit's holding that the IAM owed a duty to attempt accommodation is consistent throughout its opinion, and consistent with its sister circuit courts as readily acknowledged:

[2] Fifth Circuit:

> "[A]ll reasonable accommodations of Appellant's religious beliefs, including one which permits their nonpayment of union dues or the equivalent while continuing regular work assignments with their employer, is mandated by the sweep of 701(j)". *Cooper v. General Dynamics* 533 F.2d 163, 170 (CA 5, 1976); hearing and rehearing en banc

den'd 537 F.2d 1143; cert. den'd. sub nom. *International Association of Machinists v. Hopkins* 433 U.S. 908 (1977).

Sixth Circuit:

> "The burden is on *Essex* and IAM to make an effort at accommodation and, if unsuccessful, to demonstrate that they were unable to reasonably accommodate the employee's religious belief without undue hardship." *McDaniel v. Essex International, Inc.* 571 F.2d 338, 343 (CA 6, 1978).

Seventh Circuit:

> "[O]nce the Plaintiff here had established that his practice . . . was 'religious' . . ., the burden shifted to the employer to demonstrate that he is unable to reasonably accommodate to an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business." *Redmond v. GAF Corp.* 574 F.2d 897, 901 (CA 7, 1978).

The IAM's argument that the law is uncertain and leaves it on unchartered waters begs the question and burks the issue. The argument would be germane, at least in part, had the IAM attempted any accommodation to Anderson, which it did not. The IAM stipulated that it offered no accommodation or alternative to Anderson, and informed Anderson that he had to join the union or be fired. The district court adopted and approved this finding in its Opinion (Pet. A-3) and the Ninth Circuit correctly based its opinion on the stipulations and findings (Pet. B-3). Instead, Anderson was left to steer a course between Scylla and Charybdis, followed his individual conscience and was consequently discharged.

B.

Congressional Priority

Next, the IAM argued that charity-substitution cases present

an important and reoccurring problem of nationwide significance. This issue is discussed more fully in sub-paragraph "C", herein, addressing this Court's treatment of 701(j). The action of Congress, labor leaders, and various states is set forth more fully in "II" herein. However, one point needs to be recognized before discussing union security vis-a-vis charity-substitution.

Section 7 of the National Labor Relations Act (29 U.S.C. 157) is the cornerstone of the majoritarian rights of employees to act collectively. Section 8(a)(3) of the NLRA (29 U.S.C. 158(a)(3)) prohibits discrimination against an employee in regard to hire or tenure of employment. This prohibition runs a true course through the other provisions of the NLRA to protect individual employees except for the proviso to 8(a)(3) which carves out an exception for union security. Without the proviso to 8(a)(3) a union security provision in a collective bargaining agreement would, on its face, violate 8(a)(1) by interferring with, restraining, or coercing employees; would violate Section 8(a)(2) prohibiting an employer from "contributing financial or other support" to a union; and would violate 8(a)(3) because it is discrimination in regard to "tenure of employment".[2]

[2] "Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collectively bargaining or other mutual aid or protection, *and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).*" (Emphasis Supplied)

"Sec. 8. (a) It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided,

Thus, the union shop agreement sought and obtained by the IAM is reduced to the dignity of a contractual provision allowed by a proviso to an otherwise general rule against discrimination.

There exists a license to discriminate. Without the proviso to 8(a)(3), the IAM would be restraining and coercing employees in violation of 8(b)(1)(a), and would be causing an employer to discriminate in violation of 8(b)(2).[3]

This license to discriminate was granted to the union movement when it was a fledgling cause in our nation's history. It became Congressional policy to protect the nascent labor movement, to promote the free flow of commerce, and, hopefully, to avoid strife between employer and employee. It

Footnote 2 continued

That subject to rules and regulations made and published by the Board pursuant to Section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire of tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in Section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is later, (i) if such labor organization is the representative of the employees as provided in Section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in Section 9(3) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement * * * "

[3] 8(b) It shall be an unfair labor practice for a labor organization or its agents —

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7 * * * "

(2) to cause or attempt to cause an employee to discriminate against an employee in violation of subsection (a)(3) * * * "

became apparent in the 1940's and 50's that the labor movement had come of age, and the Congressional policy moved toward fostering collective bargaining. Legislation in the past 20 years has shown Congressional concern for a "bill of rights" to union members, and to a work force faced with the sacrifice of individual rights because of one's . . . religion. The majoritarian rights have now given way to individual rights to have an equal opportunity in the work force. It is now the highest priority of Congress that employees be free from discrimination in the arena of employment. The Supreme Court has again and again reaffirmed this Congressional policy in the 1970's. In *Alexander v. Gardner-Denver* 415 U.S. 36, 39 (1974) the court remarked:

> "[10, 11] We are unable to accept the proposition that petitioner waived his cause of action under Title VII. To begin, we think it clear that there can be no prospective waiver of an employee's rights under Title VII. It is true, of course, that a union may waive certain statutory rights related to collective activity, such as the right to strike, *Masto Plastics Corp. v. NLRB* 350 U.S. 270, 100 L.Ed. 309, 76 Sup. Ct. 349 (1956); *Boys Market v. Retail Clerk's Union* 398 U.S. 235, 26 L.Ed. 2d 199, 90 Sup. Ct. 1953 (1970). These rights are conferred on employees collectively to foster the processes of bargaining and properly may be exercised or relinquished by the union as a collective-bargaining agent to obtain economic benefits for unit members. Title VII, on the other hand, stands on plainly different ground; it concerns not majoritarian processes, but an individual's right to equal employment opportunities. Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII."

The Supreme Court recently reaffirmed this policy in *Franks*

v. Bowman Transportation Company 424 U.S. 747 (1976).

It was against this background of the license that the Ninth Circuit decided a private contract between private parties to discriminate will not be exalted above the express statutory commands against discrimination. Admittedly, the courts have held against an individual employee when their Free Exercise rights were balanced against the union security clauses prior to the passage of 701(j). Congress placed a balance into their new legislation which provided the right of individual freedom qualified by undue hardship. What employees had been seeking under the First Amendment sanctions was a complete exemption from union security regardless of its impact, financial or otherwise, on the unions. Congress weighed and balanced the considerations previously sanctioning union security, and gave to the employees their right of religious freedom in the employment sector if such freedom did not cause undue hardship to others. The requirement to accommodate by unions is a qualified right given to employees under Title VII; the First Amendment protection is an absolute right which was sought unequivocally with the unions. Congress further evidenced its attitude over equal employment by amending the National Labor Relations Act to grant absolute right to employees in the health care industry.[4]

C.

Requirement of Attempted Accommodation

Finally the IAM argues that the instant case conflicts with the

[4] 29 U.S.C. 169. Contrary to the position of the IAM, the Respondent contends that Section 19 grants additional coverage than that afforded under Title VII. This additional coverage indicates not only a new Congressional attitude, but also solidifies that "charity-substitution" is a reasonable form of accommodation under 701(j). Cf. Judge Gee, for the majority, 533 F2d at 170.

principles of *Hardison. Hardison,* supports, rather than undermines *Anderson. Hardison* stands, at least, for the proposition that an attempted accommodation is required. *Hardison* involved a defense that the company and union had taken adequate steps to accommodate the employee's religious beliefs, and to construe the statute to require further efforts of accommodation would constitute undue hardship, *supra,* at 432 U.S. 77. At Hardison's request, he bid for a job in Building 2 where he could work the day shift. While he had sufficient seniority under the applicable collective bargaining agreement to avoid work on Saturdays in Building 1, he ranked next to last on the seniority list in Building 2. Hardison's religion forbid him to work on Saturdays. After Hardison's transfer to Building 2, he was asked to work on Saturdays when other employees went on vacation. When he refused, he was fired. The district court found that TWA *attempted* to accommodate Hardison by:

> (1) agreeing with the Union to permit Hardison to swap time off with other employees;
>
> (2) excusing him on religious holidays if he was willing to fill in on the employees' other religious days; and
>
> (3) attempting to find him another job. *Hardison v. Trans World Airlines* 375 F.Supp. 877, 878 (WD Mo., 1974); 432 U.S. at 68-69.

None of these accommodations succeeded. The district court found that further accommodation would have caused TWA undue hardship because TWA only had two remaining choices. One was to let Hardison have his day off and attempt to replace him. The court found this to be extremely difficult. Hardison's job was essential; to replace him would have left another position

vacant; to employ someone not already assigned to Saturday work would have caused eight hours premium pay each Saturday; to have left the position empty would have impaired the supplying of parts for essential airline operations. *Id.* 375 F.Supp. at 889, 891. A second alternative, forcing other employees to trade shifts or jobs would have violated contractual seniority provisions and would have subjected TWA to grievances. *Id.* at 899. "Title VII", the district court said, does not force TWA to impose upon other employees because of one employee's religious beliefs. *Id.* at 891.

The Supreme Court largely adopted the district court's analysis of the facts and its interpretation of the law. The Court agreed with the district court that TWA "had done all that could possibly be expected within the bounds of the seniority system", 432 U.S. 77, "all that it could do . . . without incurring substantial cost or violating the seniority rights of other employees." *Ibid.* at 83, n. 14.

The Court's theme that to accommodate an employee's religious beliefs by discriminating against other employees reflects the court's concern that Title VII be used to create full equality for persons irrespective of religion or belief. In the present case, 701(j) creates equality by allowing an employee whose religion forbids financial support to unions to allocate the same amount that union supporters pay as dues to an equally legitimate, socially desirable, charitable organization. That interpretation ensures that every employee is taxed identically, that each suffers the same loss of income. At the same time, it ensures the employee with strong religious convictions can be true to his faith, but without imposing additional burdens on employees with contrary beliefs. Under *Hardison, Cooper, Yott,*

McDaniel and *Burns,* reasonable accommodation demands such balance of beliefs where the burden on each employee remains the same after accommodation as before.

To hold, as would the Union, that Anderson should sacrifice either his employment or his beliefs when he is prepared to pay the financial burden as other employees, constitutes discrimination and inequality and violation of the statute which provides that "similarly situated employees are not to be treated differently solely because they differ with respect to . . . religion". *Hardison, supra.*

Contrary to the IAM's contention that like TWA, it had satisfied its duty to reasonably accommodate, it has agreed (and the district court and Ninth Circuit have held) that IAM made no attempt to accommodate the religious beliefs of Anderson. To attempt an accommodation was not a Sisyphean effort, as alleged by the IAM, and a reasonable accommodation was available.

II. ***A reasonable accommodation was not impossible as a matter of law, and the IAM could have, in fact, provided a reasonable accommodation.***

At Page 14 of the Petition the argument appears to be asserted that the charity-substitution sought by Anderson was impossible because it would create a "free rider" and drain the union coffers. Succinctly, the circuit court said:

> "[N]either the union nor the employer offered any evidence to prove that the union members thought that a person was a free rider if he paid the equivalent of union dues to a charity, nor was there any evidence offered to prove as a fact that the accommodation of Anderson would otherwise have been an unduly difficult problem for the union. It relied simply upon general sentiment against free riders." 589 F.2d at 402.

A.

AFL-CIO Policy

At Page 13, the IAM says that the loss of Anderson's dues threatens its very existence. First, it must be remembered that the union operated for many years without Anderson's $120.00 per year. In fact, the union operated without approximately 805 of the employees, in Anderson's bargaining unit alone, contributing dues from 1959 to 1972. Second, it must be noted that the union donated annually to charity the amount of 36¢ per member (Pet. A-9, n. 14). There were approximately 16,000 members of the union during the relevant times from whose dues the union deferred around collective bargaining directly to charity. With the union donating 36¢ per year for each member, a total annual charitable contribution was made of $5,760. Figuring $120.00 per employee per year for dues, the union could have 48 employees paying directly to a charity, in lieu of pooling the monies, before suffering financial loss of one cent.

Probably the best summarization of the union's contention of loss of dues is set forth in *Burns:*

> "The concern that quantities of religious objectors would deplete the financial resources of the union is not shared by George Meany, President of the AFL-CIO. A letter from George Meany was introduced into evidence in which Mr. Meany expressed his opinion that religious views such as those of Burns should be accommodated to respect individual religious reservations in the administration of union security agreements, and suggested that an appropriate method of accommodation would be the payment of the equivalent of dues to a union charitable fund or to an agreed upon charity." 589 F.2d at 407, n. 2.[5]

[5] The full content of the letter, in relevant part, is as follows:

". . . In other cases religious objectors have not participated at all in union enterprises, *but have paid the equivalent of dues to a union charitable fund or to an agreed upon charity* . . .

In any event, I believe the unions, and employers too should accommodate themselves to genuine individual religious scruples, and I am sure that all of our unions will take that view too. [I intend accordingly to propose to the AFL-CIO Executive Council that it should adopt a strong policy statement to that effect.]; and that the International Unions affiliated with the AFL-CIO undertake to insure that their local unions scrupulously respect individual religious reservations in the administration of union security arrangements." (Emphasis Supplied) (George Meany's letter to the Honorable Frank Thompson, Jr., Chairman, Special Subcommittee on Labor of the House Committee on Education and Labor, dated May 28, 1965, at pg. 2).

B.

Congressional Action

As further evidence of the AFL-CIO's expertise and maturity in the area, it recently supported a "conscience clause" amendment in both houses of Congress. A charity-substitution arrangement, identical to that sought by Anderson, was supported by the AFL-CIO and became a part of the Labor Law Reform Act. Although the Labor Law Reform Act ultimately did not become law, it is indicative of the AFL-CIO's support on this point. No less an advocate for the union than Representative Frank Thompson, joined hands with other House leaders to secure House approval for charity-substitution. The Congressional Record of November 1, 1977, H-11901-H11907 and H-11967-H11968, sets forth the Congressional debate with special mention made of *Anderson* at Page 11903. This Congressional history is an illustration that charity-substitution is an appropriate response to the accommodation/hardship standard.

Congress did pass into law a recent provision providing that an employee of a health care institution who holds a religious belief against joining or paying money to a union, cannot be required to join or support a labor organization as a condition of continued employment. In order to deal with any potential "free rider" problems, Congress provided that such employee would pay the equivalent of dues and initiation fees to a charity recognized

by the Internal Revenue Code. The first question one might ask in looking at the legislative history of the Hospital Amendment was why they needed charity-substitution spelled out if it had been coVered by 701(j) as contended by Anderson. The answer is that the Hospital Amendment gave extended protection to the employee which would not vanish if undue hardship was proven. In other words, accommodation is a right qualified by undue hardship to an individual's religious beliefs. Exemption is an absolute right with no qualification as to undue hardship. *Ibid.* 29 U.S.C. 169.

C.

State Laws

The feasibility of charity-substitution is evidenced by the statutes of Washington, Oregon, Alaska, and Montana enacting the exact accommodation sought by Anderson.[6] Those states say charity-substitution is working elsewhere in the field of public employment, and are consistent with the United States Congress legislation in the area of hospital care.

The foregoing could be concisely reduced to the thought that the union didn't provide accommodation to Anderson because they didn't try to. With no attempted accommodation at all, the Ninth Circuit correctly held that they had failed their burden under 701(j).

[6] Revised Code of Washington, 41.56.122; Civil Statute, 243-666 of the State of Oregon; A.S. 23.40.225; Civil Statute, 59-1603 of the State of Montana.

III. *Section 701(j) provides a secular purpose, does not primarily effect religion, and does not entangle government with religion.*

A.

The IAM had not properly preserved its attack on the constitutionality of 701(j).

The circuit court below declined to reach the constitutional question because the IAM had only obliquely preserved it for appeal. 589 F.2d at 402, n.5. Moreover, the IAM failed to give the proper notice at the circuit court level as required by Federal Rule of Appellate Procedure 44, nor sought compliance with the provisions of 28 U.S.C. ¶ 2403. Under the circumstances, this Court does not properly have the constitutional issue before it and should not address the merits.

B.

The duty to accommodate does not violate the Establishment Clause of the First Amendment.

Without prejudice to the foregoing, and solely as a response to the Petition, Anderson maintains that the Congressionally imposed duty to accommodate does not violate the Establishment Clause to the First Amendment.

(1)

This Court has long held through stare decisis that an Act of Congress should not be held unconstitutional if any other possible construction remains available. This Court most recently reaffirmed this policy in *NLRB v. Catholic Bishop of Chicago* ____ U.S. ____, (1979), where Chief Justice Burger writing for the majority said:

> "Although the respondent pressed their claims under the Religion Clause, the question we consider first is whether

> Congress intended the Board to have jurisdiction over teachers in church-operated schools. In a number of cases the Court has heeded the essence of Chief Justice Marshall's admonition in *The Charming Betcy*, 2 Cranch (6 U.S.) 64, 118 (1804), by holding that an Act of Congress ought not be construed to violate the constitution if any other possible construction remains available. Moreover, the Court has followed this policy in the interpretation *of the Act now before us and related statutes.*" (Emphasis Supplied) 59 L.Ed.2d 533, 541 (1979).

The writer would respectfully take issue with the Petitioner, at Page 22-24, that *Catholic Bishop of Chicago* controls the instant case. Clearly, from the above passage, the court never reached the constitutional question; but instead held that the NLRB did not have jurisdiction leaving any other determination unnecessary.

The court's policy of avoiding constitutional attacks has been consistently evidenced with specific dealings of the National Labor Relations Act itself. In fact, the constitutionality of the NLRA owes its survival to just such a policy. It may be remembered that at the time of passage of the NLRA most constitutional observers doubted the constitutionality of Congress to legislate over employer and employee relations governing manufacturing. The Fifth Circuit had found the NLRA unconstitutional on just such grounds (83 F.2d 998), and only by a 5-4 vote did the fledgling Act survive judicial scrutiny two years later. Chief Justice Hughes, who wrote the majority opinion, said, "the cardinal rule of statutory construction is to save and not to destroy. We have repeatedly held that as between two possible interpretations of a statute, by one of which could be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act. Even to avoid a serious doubt the rule is the same." (citations omitted) *NLRB v. Jones & Laughlin Steel Corp.* 301 U.S. 1 (1937).

A constitutional challenge was put squarely between the Free Exercise Clause of the First Amendment and the Congressional authorization of union security in *IAM v. Street* 367 U.S. 740 (1961).[7] Avoiding the constitutional issue in *Street*, the court stated the rule:

> "Federal Statutes are to be construed as to avoid serious doubt of their constitutionality. 'When the validity of an act of Congress is drawn in question, and even if serious doubt of constitutionality is raised, it is a cardinal principle that this court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'" (Citation Omitted) 367 U.S. at 749.

The viability of this cardinal principle is evidenced by the earlier quote from *Catholic Bishop of Chicago, supra* at 541.

(2)

Should this Court find need to consider the Petitioner's attack on the Constitution, Congressional action underlying 701(j) will pass Establishment Clause concern. At every juncture of this long and winding trail of litigation, the IAM has erected new walls for Anderson to clear and gain his rightful place by reinstatement. Now, the IAM submits that 701(j) is a violation of the fundamental constitutional concepts upon which this country was founded, and that this Court should declare it unconstitutional. Anderson's sincerely held religious beliefs, based on over 75 years of instruction by his Church, are simply beliefs based on

[7] *Street* arose in a context of union security under the 2 § Eleventh of the Railway Labor Act which passed in 1951. A review of the legislative history of the 1951 Amendment shows it was patterned after 8(a)(3) of the National Labor Relations Act which was amended under Taft-Hartley in 1947. The courts have consistently held under both Acts, that only "financial core" membership is authorized and, thus, avoided the constitutional question. Accord, *Abood v. Detroit Board of Education*, 431 U.S. 209, 217, n. 10 (1977); *NLRB v. Hershey Food Corp.*, 513 F2d 1083 (CA 9, 1975); *Railway Employees Department v. Hanson*, 351 U.S. 225, 238 (1956); *Marden v. IAM*, 576 F2d 576 (CA 5, 1978).

general distrust for the union says the IAM. It is too complicated to determine good faith, or it unduly harms the majority says the IAM. Let us not be overburdened by efforts to allow Anderson to earn a living without violating his religious beliefs they say. Accommodation under the First Amendment is the background between the free exercise and establishment drafted by our founding fathers.

It is a historical fact that the American political experience has been deeply ingrained with the concept of religious freedom in our society from the time of the first colonies. Indeed, experience in England and some of the colonies, convinced the drafters of the Bill of Rights that the government should assure that an American could follow the dictates of his religious beliefs and the secular economic world.

Likewise, the drafters of the Bill of Rights were justifiably concerned about the existence of a religious state. Based on that concern, Thomas Jefferson said that the First Amendment built a wall of separation between church and state. *Everson v. Board of Education* 330 U.S. 1 (1947). Easier said than separated has been the lesson acknowledged by the courts in this sensitive area of constitutional law. Chief Justice Burger, writing for the majority, said that "the line of separation, far from being a 'wall', is a blurred, indistricted, and invariable barrier depending on all the circumstances of a particular relationship". *Lemon v. Kurtzman* 403 U.S. 602, 614 (1971).

Two touchstones should trigger the judicial analysis of 701(j) and the First Amendment. First, prior Supreme Court decisions have charted their way through difficult areas of aid to secular and sectarian schools, conscientious objectors to war based on religious beliefs and *raison d'etre,* and tax benefits to churches

and secular eleemosynary institutions. A reality of these decisions is that separation is not an absolute:

> "Our prior holdings do not call for total separation between church and state; actual separation is not possible in an absolute sense; some relationship between government and religious organizations is inevitable." (Citations Omitted) *Lemon,* supra, at 614.

Second, the Supreme Court has announced several litmus "guidelines" which can be summarized: (1) the statute must have a secular legislative purpose; (2) must have a primary effect that neither advances nor inhibits religion; and (3) the statute and its administration must avoid excessive government entanglement with religion. *Meek v. Pittenger* 421 U.S. 349, 358 (1975); *Committee for Public Education v. Nyquist* 413 U.S. 756, 772-773 (1973); *Lemon, supra,* at 612-613; *Tilton v. Richardson* 403 U.S. 672-678 (1971); *Walz v. Tax Commission* 397 U.S. 664, 674 (1970).

Admittedly, a Congressional enactment must pass all three guidelines. *Nyquist* 413 U.S. at 774.[8] Here, as other courts have found, the statutory requirement of reasonable accommodation without undue hardship passes muster under all established criteria.

(A)

The passage of 701(j) had a secular purpose to prevent employment discrimination.

The least difficult callipering of the guidelines the Court has set forth is the question of secular purpose. The reasonable accommodation requirement, like the statutory scheme of Title

[8] See explanatory note 413 U.S. 773, n. 31, citing Chief Justice Burger's overview in *Tilton, supra.* Although state action is not a concern in the instant case, the same caveat applies.

VII as a whole, was intended to prevent discrimination in employment. Just as the Supreme Court announced a business necessity to prevent citizens from denial of employment, in 701(j) Congress spelled out a business accommodation test that was qualified by a showing of undue hardship. Although the lower courts have not clearly articulated the equivalency of business necessity with reasonable accommodation, it is certain that the defense of undue hardship does not create a greater burden.[9]

The duty to accommodate, as expressed in 701(j), states the secular legislative purpose guaranteeing an employee that his ability to earn a living will not be impaired because of his religious beliefs. This is consistent both with the prologue to the Civil Rights Act of 1964, and the prologue set forth in the Amendments to the Civil Rights Act in 1972. The thought of impairing a worker's right to earn a livelihood because of his religious beliefs would have caused Thomas Jefferson and James Madison, themselves, to do a little masonry work on the wall. Consistently, Senator Randolph, Senate sponsor of 701(j), indicated, "[I]t is my desire and hope the desire of my colleagues to assure that freedom from religious discrimination in the employment of workers is for all times guaranteed by law... The term 'religion' as used in the Civil Rights Act of 1964 encompassed, as I understand it, the same concepts as are included in the First Amendment — not merely belief, but also conduct; the freedom to believe, and also the freedom to act." Legislative History of the Equal Employment Opportunity Act of 1972, Senate Subcommittee on Labor, Reprint Page 712-713.

To satisfy the argument of the IAM at Page 21 of their Petition, the Congress would have to examine every act it passed

[9] *Yott, supra,* 501 F2d at 402, n. 6.

to be sure that some religious body did not gain some benefit thereby.[10] If valid secular purposes are destroyed by benefit to some religious bodies, then the conscientious objector statutes have curiously withheld constitutional scrutiny. Certainly when an individual whose religious training and beliefs require his claim of conscientious objector, he benefits in comparison to the majority who must serve a more direct confrontation with the enemy. *Clay v. United States* 403 U.S. 698 (1971). Likewise, an individual whose religious beliefs teach against financial association with unions may also take benefit of a statutory scheme of reasonable accommodation without pulling bricks out of the wall of separation. Just as an army staffed by conscientious objectors would be of questionable viability, a work force free of discrimination would be difficult to achieve if we exclude, by discharge, sincere religious believers. Although one court has pointed out that no law requires an employee to work for his employer, that argument must presume some ability to control his beliefs regarding his divine being. Surely, Anderson's life would have been a lot simpler if divine intercession worked in reverse. If a federal statute is the source of the authority by which any private rights are lost or sacrificed, then a federal statute may constitutionally purge the work place of religious discrimination by which private rights may incidentally benefit.

(B)

The primary effect of 701(j) was to eradicate religious discrimination in the work place.

A more difficult area, at least in relation to secular purpose, has been the court's determination of primary effect. The court's

[10] In the writer's home state, a religious sect has settled a Western part of the state due to their beliefs in agriculture. Surely Congress can pass legislation that benefits the agrarian economy generally without concern that this religious sect will derive impermissibly immediate benefit.

writings on this second touchstone appear blended with its concern that the government make no law *respecting* an establishment of religion. *Lemon, supra,* at 612.

An understanding of the Court's holdings and interpretations begins with an understanding of what "principle or primary effect" does not include. The crucial question is not whether some benefit accompanies itself to a religious body as a result of legislation, but whether the primary legislative intent advances that religion. The Court has noted several cases in the aid of sectarian school areas where the alleged Constitutional violation has been upheld, even though admittedly, some benefits resulted to the religious institution. *Tilton v. Richardson* 403 U.S. 672, 679 (1971). Earlier, the court made cogent note that granting tax exemptions to churches necessarily operates to afford an indirect economic benefit, but upheld state taxes granting property exemption to churches over the argument of primary effect. *Walz v. Tax Commission* 397 U.S. 664, 674-675 (1970). Finally, the court has recently attempted to draw the line on primary effect, but has embraced its prior positions that incidental effect resulting to a religious institution does not infringe on the Establishment Clause. *Nyquist, supra,* at 775-776. Cf. 413 U.S. at 783, n. 39.

The Court has noted, and distinguished when appropriate, the primary effect to individuals versus religious institutions. Upholding a New York statute authorizing the loan of secular text books to parochial students, the court appreciated that a financial benefit was awarded to parents and children, not to schools. *Board of Education v. Allen* 392 U.S. 236, 243-244 (1968). While free books might make it more likely that a child would attend a sectarian school, this would only be an incidental

benefit which did not encroach into the prohibited zone. *Allen* relied on an even more profound example of spending tax raised funds to pay bus fares for New Jersey students attending parochial schools. Obviously, acknowledged the court, some students might not even be able to go to sectarian schools if the parents were compelled to pay bus fares out of their own pockets. *Everson, supra,* 330 U.S. at 17. Admitting the legislatively secular benefit to the sectarian sector, the court held that bus fares to individuals did not foster religion within the First Amendment confines and restrictions.

Under Anderson's proposed form of accommodation, he would receive no pecuniary benefit, incidental or otherwise. He pays the same amount of money to an equally socially desirable, non-religious, institution (charity). He pays the same amount of dollars as other similarly situated employees. He has no residual benefit which accommodates him in dollars which then, in turn, can be used to promote his religious beliefs. The IAM, as already demonstrated, makes payments from its general fund to charity far in excess of Anderson's per year proposed subscription. Neither Anderson's Church, nor any other religious body, receives any primary benefit as that term is normally used or has been defined by the Supreme Court.

Section 701(j) is available to all members of all religious bodies whose beliefs conflict in the arena of the work place. Of course, the exercise of those beliefs is qualified by the standard of undue hardship. Thus, 701(j) does not primarily benefit one religion over the other, or religion over sectarian, within the statutory scheme to avoid religious discrimination. This point is easily gleaned from the legislative intent by a conversation between Senators Dominick and Randolph:

> Mr. Dominick. "I have listened very carefully to the Senator's presentation, and was impressed by it. Could the Senator tell me, whether this Amendment would also effect, for example, the Amish or some other religious sect who has a different method of conducting their lives than do most Americans."
>
> Mr. Randolph. "Yes; I envision that it would." Legislative History at 713.

On the other hand, 701(j) does not benefit religious beliefs as opposed to non-believers of religion. *Young v. Southwestern Savings and Loan* 509 F.2d 140 (CA 5, 1975).

Does primary benefit result to the religious if another employee travels to the beat of a different drum purely because of secular beliefs against forced association with, or contributions to, a union? The secular belief would certainly fall outside the scope of the statutory scheme of 701(j) while a similar religious belief would be protected. That consequence does not, however, result in a primary benefit to the religion, or worshiper himself, for that matter. Congress may permissively legislate an accommodation, as it may for a tax exemption, without inviting benefits to a religious body to a degree which would result in unconstitutionality. That degree, or failsafe device, is also part of the statutory scheme. Although the First Amendment Religion Clause did not compel Congress to pass 701(j), the First Amendment is not violative by a statutory scheme which grants accommodation without undue hardship to persons with those religious beliefs. In a free exercise case, the court recognized that an employee was available for work, except as prohibited by her religious beliefs. The court said in its holding that a Seventh-Day Adventist was entitled to unemployment compensation, but that its decision neither (1) served to abridge other persons' religious beliefs; nor (2) prevent a statutory scheme that protected secular,

as well as, religious beliefs. *Sherbert v. Verner* 374 U.S. 398, 409-410 (1963). The degree of primary effect, measured by the calliper of the conscientious objector statutes, is no greater than the scheme of objection based on religious training and belief. *U.S. v. Seeger* 380 U.S. 163, 173 (1965).

(C)

Accommodation does not impermissibly entangle government and religion.

The IAM alleges, at Pages 21-22, the excessive government entanglement if the EEOC or courts are required to enforce reasonable accommodation. This argument is not well taken based on the Supreme Court's prior determination of similar issues. The review, and implementation thereof, does not approach the criteria found impermissible in *Lemon, supra,* or the 20-year provision in *Tilton, supra.*

A proper starting point for the analysis is the language in *Walz* 397 U.S. at 675:

> "[T]he questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continual surveillance leading to an impermissible degree of entanglement" . . . "The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenues to churches but simply abstains from demanding that the church support the state."

701(j), here, allows an employee to abstain from financial support of the union, and pay the equivalent to a neutral, non-religious, and non-union charity. Questions may of course arise regarding other forms of accommodation. What if the employee wants to simply keep the money for his own "in-house" religion? What about determining the sincerity of his religious beliefs about paying to a charity? Those considerations are not present

in the instant case and need not be reached for determination. The parties agreed, the district court found, the Ninth Circuit approved, and the IAM admits that Anderson is sincere in his religious belief that joining or contributing to a labor union violates his religious beliefs (Pet. Pg. 5). However, to meet the argument, we must note that the developed case law dictates that it is the claimant's burden to show his beliefs are religiously based. *Seeger* places definition to the permissible scope of examination into religious beliefs, but does not shift the burden from the employee to first make a showing. This resolution does not require a convention of theologians; but only a secular determination that the beliefs are sincerely held, and in their scheme of things are religious. The writer suggests that this fact finding is not as subjective, or difficult, as good faith bargaining under the NLRA. Neither is it as subjective, or difficult, as showing discriminatory effect based upon statistical disparity. In fact, a review of all the litigation under 701(j) shows a non-existence of problems on the "sincerely-held religious beliefs" issue. As Justice Holmes commented, "A page of history is worth a volume of logic". *New York Trust Company v. Eisner* 256 U.S. 345, 349 (1921).

The instant resolution is certainly a more broad channel than the narrow width referred to in conscientious objector cases. The Supreme Court has consistently approved the statutory scheme of conscientious objectors which requires an administrative inquiry directly into proposition two, i.e., opposition based on religious training and beliefs. Nor does 701(j) require constant surveillance of the division of dollars for secular versus sectarian purposes. The inquiry is not as difficult, at least certainly not more than, the determination if a purported church qualifies for a property tax exemption. As

stated earlier, *Catholic Bishop of Chicago,* does nothing to help us resolve the instant case. The court never reached any constitutional consideration, *supra,* 59 L.Ed.2d at 541, 546.

Of the two district courts to hold 701(j) unconstitutional, Judge Real did not specifically address the entanglement problem. *Yott v. North American Rockwell* 428 F.Supp. 763 (CD Cal., 1977) on remand.[11] Judge Cohill in *Gavin .v Peoples Natural Gas Company* ___ F.Supp. ___, 19 EPD 9033, (WD Penn., 1979) was absolute in approach and avoiding in resolution. These analyses by the district courts cannot be squared with the Supreme Court which has repeatedly found no Establishment Clause problem in exempting religious observers from state-imposed duties, even when the exemption was in no way compelled by the free exercise provision. *Wisconsin v. Yoder* 406 U.S. 205, 234-235, n. 22 (1972); *Sherbert, supra,* 374 U.S. at 409; *Zorach v. Clauson* 343 U.S. 306 (1952).

Lastly, Congress itself considered constitutional proportions of 701(j) before implementing an effort to eradicate religious discrimination.

> Senator Williams (Chairman). "As I read the First Amendment of the Constitution, there is no problem here presented by the Amendment in connection with the first clause:
>
> > 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.'
>
> In dealing with the free exercise thereof, really, this promotes the constitutional demand in that regard.
>
> I certainly agree with the objective of the Amendment."

[11] Cf. *Scott v. Southern California Gas Company,* 8 EPD 9450 (CD Cal., 1973).

IV. ***Other reasons against granting certiorari.***

The Ninth Circuit correctly decided the case below.

The IAM attempts to distinguish the denial of certiorari in the companion case of *Burns;* and an almost identical case involving the same parties, *Cooper v. General Dynamics.* The decisions in *Cooper* and in *Burns* both turned on the issue that the defendants failed to satisfy their burden of proof because they attempted no accommodation. In *Anderson, Burns,* and *Cooper,* the union took an implacable position that it was neither required, nor agreeable, to working with the employee in any way. Neither the IAM in *Anderson* or *Cooper,* or the UTU in *Burns,* made any attempt to accommodate the employees' religious beliefs. These cases, and the actions of the Union, were identical in recital and performance. It is fair to assume that when the Court denied certiorari in *Cooper,* after its decision in *Hardison,* that it was satisfied that both cases read together present a correct interpretation of 701(j) and 8(a)(3). Similarly, when the Court denied certiorari in *Burns,* it did not care to disturb the Ninth Circuit's holding. Simply stated, there are neither issues nor arguments in *Anderson,* which have not already been rejected by the Supreme Court for consideration by certiorari.

CONCLUSION

The Union attempted no accommodation at all to the religious beliefs of David Anderson. The IAM did not carry its burden of proof, and wholly failed to demonstrate any undue hardship. The Courts have consistently held that it is the Union's burden to accommodate or show that undue hardship would exist by any form of reasonable accommodation.

The courts for the Fifth, Sixth, Seventh, and Ninth Circuits are in complete agreement that under Title VII there exists a duty to accommodate without undue hardship. The Supreme Court of the United States says there exists a duty for the Union to accommodate short of incurring undue hardship. It is implicit in its conclusion that accommodation is owed, and that 701(j) reaches and complements 8(a)(3) as a pronouncement of today's National Labor Policy. The IAM failed to carry its burden of proof that a reasonable accommodation to Anderson's religious beliefs would constitute undue hardship.

The Court has previously denied certiorari in the almost identical case of *Cooper* and *Burns*. There are neither issues nor contentions to distinguish *Anderson* for consideration of the granting of certiorari in this case.

For the above reasons, the Writ of Certiorari should be denied.

Respectfully submitted,

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